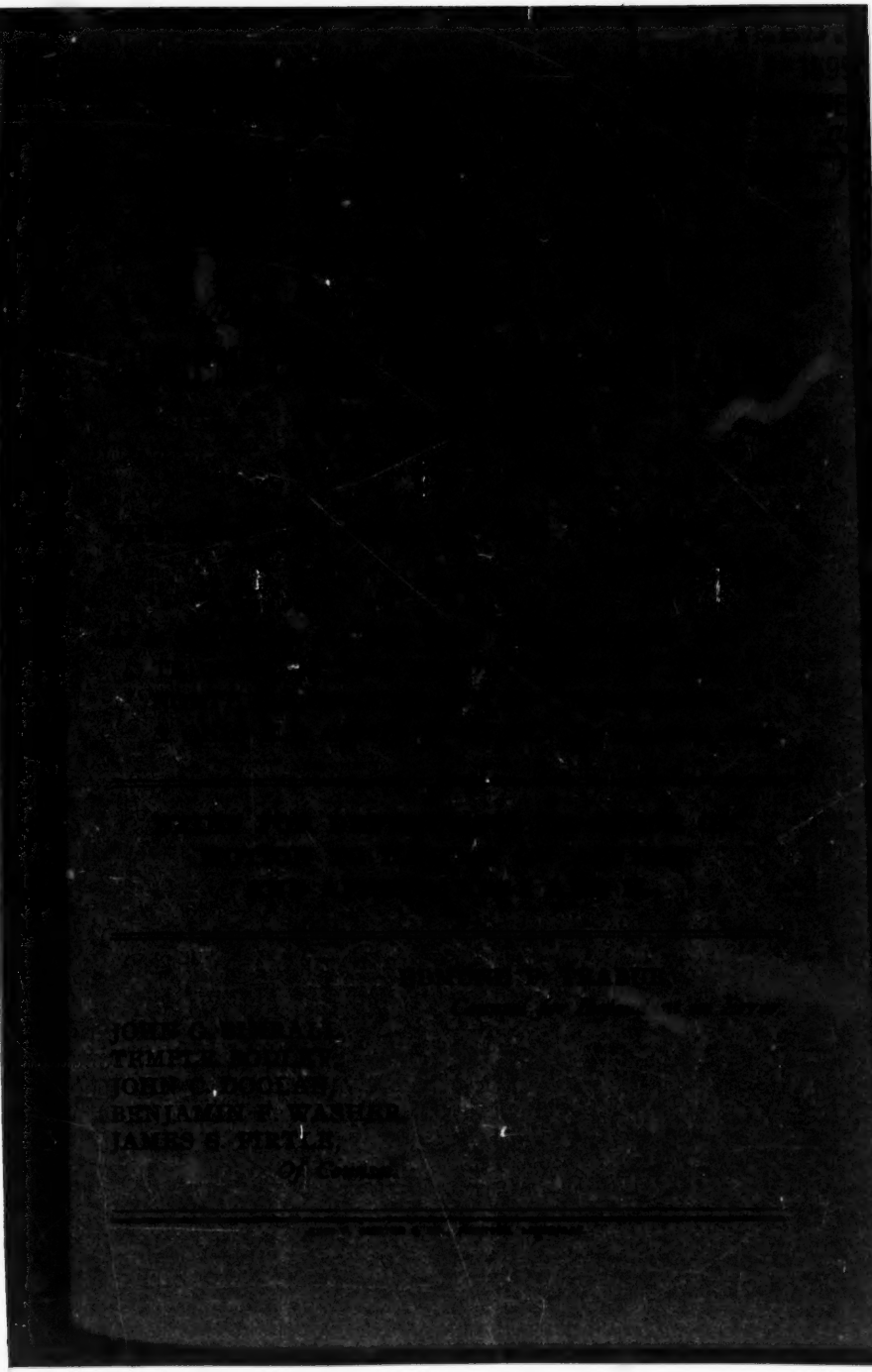

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 656.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

VERSUS

A. L. SCHMIDT, IN HIS OWN BEHALF AND AS TRUSTEE OF THE BONDHOLDERS OF THE NORTHERN DIVISION OF THE CUMBERLAND & OHIO R. R. COMPANY ET AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS OR AFFIRM.

STATEMENT.

This case is on motion under Rule 6 to dismiss for want of jurisdiction, or affirm. Plaintiff in error contends that the judgment of the Circuit Court affirmed by the Court of Appeals of Kentucky, deprives plaintiff in error of its property without due process of law. (Rec. 323.) The facts are elaborately stated by our colleague.

The judgment assailed was entered April 2, 1898, and affirmed by the Court of Appeals as a "delay case," October 28, 1898. (Rec., pp. 308 and 317.)

The amount of the judgment represented the earnings of the Louisville, Cincinnati & Lexington Division of the railway system of plaintiff in error, made on the traffic supplied to it by the Northern Division of the Cumberland & Ohio Railroad. The earnings were, by said judgment, subjected to a lien created

thereon by a mortgage executed July 2, 1879, by the Louisville, Cincinnati & Lexington (hereinafter called L. C. & L.) Railway Company, former owner of said division of said railway system (Rec. 14); and this suit was instituted by the trustee in said mortgage to enforce a lien on said earnings.

In the opinion pursuant to the mandate whereof the judgment of April 2, 1898, was entered, the court said:

"In our judgment the question presented by this appeal is one of procedure. This suit is essentially a proceeding *in rem* to subject to appellant's claim the net profits on business coming to the line of the Louisville, Cincinnati & Lexington R'y Co. from and over the Cumberland & Ohio."

The opinions (see stipulation, Rec. 319, item 35) are reported in 95 Ky. 291; 99 Ky. 143, and 19 Ky. L. R. 1626, and the last two are appended.

The defendants in error are holders of bonds secured by the aforesaid mortgage of earnings, and a mortgage on said Northern Division of the railroad of the Cumberland & Ohio (hereinafter called C. & O.) Railroad Company. The latter company, in 1879, executed said mortgage, and then leased its railroad to the Railway Co. which, as further security for the payment of interest upon and sinking fund to retire the bonds, executed said mortgage upon the net earnings accruing from freight supplied to it by the lessor. (Rec. 12, 20, 25, 27.)

November 1, 1881, the L. C. & L. R'y Co. conveyed its railroad and other property to plaintiff in error, and in the deed of conveyance assigned and transferred the aforesaid lease, which was accepted by the grantee, who expressly assumed its obligations. (Rec. 270.) Prior thereto, the grantee had purchased all the grantor's capital stock. (Rec. 271.)

Since the purchase the plaintiff in error has operated the properties purchased and the Northern Division of the C. & O. R. R. and taken the earnings thereof. (Rec. 271.)

This suit was instituted October 12, 1885, by defendant in error, A. L. Schmidt, as bondholder and trustee in the mort-

gage against the lessee of the railroad and mortgagor of the earnings (Rec. 1), to subject the net earnings covered by the mortgage. (Rec. 13.)

Since its institution the suit has been fought stubbornly in the trial court and Court of Appeals—having made five trips to the latter court—and a record of many thousand pages at enormous expense has been accumulated in depositions, reports of railway earnings, etc., etc. (Rec. 38, 60, 87, 90, 142, 146, 166, etc. etc. Stipulation 319.)

After over eight years litigation, the Court of Appeals settled in Schmidt, Trustee, v. R'y Co., 95 Ky. 271, Feb. 8, 1894, the proper mode of computing the earnings covered by the mortgage, which was the gist of controversy.

On return of the case to the Circuit Court, the L. C. & L. R'y Co. responsive to a rule to pay into court the amount adjudged, said:

"That in 1881, it sold and conveyed, for a consideration paid at the time, all its property, rights, privileges and franchises except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets or funds of any kind with which to comply with the order of this court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it.

"HELM & BRUCE, *Att'ys. for Def't.*"

"The affiant, G. H. Ellis, states he is the Secretary of the defendant Louisville, Cincinnati & Lexington Railway Co., and is the chief officer of said Company now in the State of Kentucky, and that he believes the statements of the foregoing response to be true." (Rec. 215.)

To the rule to report the amount of the net earnings accruing after the period within which the net earnings adjudged as aforesaid accrued, said Company said that it

"States and shows to this court that it has not made any net earnings or earnings of any kind since the date aforesaid on business coming to it from or over the Cumberland & Ohio road,

nor has it made earnings of any kind, since it does not own any railroad or property of any character whatever, and has not since the date aforesaid. HELM & BRUCE, *Att'ys. for Def't.*

"M. H. Smith says that he is the President of the defendant and that he believes the statements contained in the foregoing response are true." (Rec. 217.)

The respondent did not name its vendee, but it was, as aforesaid, the Louisville & Nashville Railroad Company, plaintiff in error.

The record affirmatively shows (p. 79) that *plaintiff in error* was defending the suit:

"At a Court held for the Court aforesaid, on the 20th day of April, 1891—

"Came Barnett, Miller & Barnett and filed a written notice in this action duly accepted.

"And on their motion their names are stricken from the record herein as attorneys for Louisville & Nashville Railroad Company.

"Said notice is in words and figures as follows, to-wit:

Louisville Law and Equity Court,

Schmidt, - - - - - - - - Plaintiff,
vs.
L., C. & L. R'y Co., - - Defendant. } No. 1860. Notice.

"The Louisville & Nashville Railroad Company will take notice that on Monday, April 20, 1891, at the motion hour, we will move the Court to strike our names from the record herein as attorneys for said Company.

"BARNETT, MILLER & BARNETT."

This notice was accepted by present counsel for plaintiff in error as follows:

"Notice accepted.

"HELM & BRUCE,
"Attorneys for Def't."

Promptly after taking charge of defense said Helm & Bruce proceeded to take the depositions of the divers officers of plaintiff in error:

Of M. H. Smith, who verified the response (Rec. 217), and who swore that he was the "President of the Louisville & Nashville Railroad Co."

Of Edward Rowland (Rec. 174), "Auditor of Receipts of the Louisville & Nashville Railroad."

Of Charles Haydon (Rec. 174), "Assistant Comptroller of the L. & N. Railroad."

The report forming the basis of the decision in 95 Ky. 289, was by Mr. Helm exhibited to witness, and he inquired "whether this report was taken from the records of the Louisville & Nashville Railroad office under your supervision, and whether you know it to be correct." Haydon responded: "Yes, sir; this account was made out in my office, and was taken from the books."

R. E. Sewell, who made said report, was "Auditor of Disbursements of the Louisville & Nashville Railroad Co." (Rec. 72.)

When the responses of the L. C. & L. Railway Co. were held sufficient, defendants in error tendered an amended petition (Rec. 224), wherein they stated, in substance, that, after the execution of the lease and mortgage aforesaid, of which plaintiff in error had full notice, viz., about November 1, 1881, said lessee conveyed all its property to plaintiff in error, and assigned to it said lease.

That prior thereto the grantee had acquired all the capital stock of the grantor, and after the sale operated the properties purchased and leased, and took the rents and profits thereof, and knew that the earnings mentioned in the petition in this suit referred to the earnings made in the operation of the properties purchased; also that it filed the answer in this suit in the name of the Louisville, Cincinnati & Lexington Railway Co., and filed all other papers which were filed on behalf of the defense, and employed counsel to make the defense in the name of the Louisville, Cincinnati & Lexington Railway Co., and introduced all the witnesses who testified on behalf the defense, and had been in court defending the action, and had controlled the defense

thereof continuously from the time the summons on the original petition was served on Milton H. Smith, who was its President, etc. (Rec. 233.)

From the order refusing leave to file the amended petition defendants in error appealed to the Court of Appeals, which delivered the opinion reported in 99 Ky. 143. (See Appendix.)

The Appellate Court therein, p. 148, said:

"It is earnestly contended by counsel for appellants that the rule laid down in Heckman v. Louisville & Nashville Railroad Co., 85 Ky. 638, following and amplifying the doctrine announced in Louisville & Nashville Railroad Co. v. Hall, 12 Bush, 131, applies to this case and is decisive of it. Appellants claim that the Louisville & Nashville Railroad Co. was the real defendant in this case, made the defense in the name of the Louisville, Cincinnati & Lexington Railway Co., and is bound by the judgment.

"This appeal, therefore, presents two questions for decision: First, whether, upon the facts alleged in the amended petition and disclosed by the record, the Louisville & Nashville Railroad Co. is bound by the judgment herein to the extent that it received the net profits accruing from the lines of the Louisville, Cincinnati & Lexington Railway Co. out of business coming to it from or over the Cumberland & Ohio; and, second, if so, whether the proper procedure has been adopted to subject these earnings to the appellants' claim.

"Upon the first question there is little difficulty," etc.

After elaborate discussion of the authorities the Court said (p. 155):

"But we are of opinion that after the appeal and judgment in this case it would be too late to bring into this litigation one who was neither a party to the record nor bound by the judgment. In our view the facts stated in the amended petition did not give the appellants the right to file a petition making the Louisville & Nashville Railroad Co. a party defendant to this litigation, for upon the theory of that amendment, and considering the facts therein stated to be true, that Company was already a party defendant and bound by the judgment. The proper procedure, therefore, would have been either to institute a separate suit against the Louisville & Nashville Railroad Co., setting up the record in this suit and the facts connecting that Company with this litigation, or to proceed against the Louisville & Nashville Railroad Co. in this suit by rule based upon an affidavit, stating the facts set out in the amendment." (See amendment.)

On return to the lower court, defendants in error adopted the second alternative suggested in the opinion, and filed an affidavit stating the facts alleged in said amended petition (Rec. 262), and asked a rule against plaintiff in error to pay into court the amount ascertained by the judgment, which was denied, and said defendants again appealed. (Record, 288.)

The judgment of the lower court was reversed January 14, 1898. (Rec. 290.)

On return of the case to the Circuit Court, said defendants renewed their motion for a rule against the plaintiff in error to pay into court the amount of the judgment aforesaid, and their motion was, pursuant to the mandate of the Court of Appeals, sustained. (Rec. 292.)

In response to the rule, plaintiff in error, for the first time, undertook to raise the Federal question. (Rec. 294.)

From the judgment requiring plaintiff in error to pay into court the amount adjudged, it appealed to the Court of Appeals. (Rec. 308–9.)

The judgment of the lower court, entered pursuant to the mandate of the Court of Appeals, was affirmed as a "delay case" October 27, 1898 (Rec. 317), and this writ of error was prosecuted.

POINTS.

Our motion should prevail, because:

1. Had a Federal question existed, it would have been waived, not having been seasonably raised.

2. This Court is without jurisdiction, because the basis of the State Court's decision was not a Federal question; but a question of general equity jurisprudence, *viz:* if plaintiff in error was estopped by its own acts to deny that it was a party defendant to this suit.

3. The question of procedure urged as a Federal question involves no Federal question, but one of State practice, which this Court will not control.

4. The question which plaintiff in error seeks to raise has been so often decided against its contention by this Court as to have become frivolous, and its advocacy to indicate an intention to urge it for delay merely.

I.

There was no suggestion of a Federal question until March 21, 1898 (Rec. 294), and the opinion of the Court of Appeals announcing the doctrine which plaintiff in error now claims infringes its Constitutional rights was delivered April 4, 1896. (Rec. 238.)

The opinion was delivered on the motion to file the amended petition, and shows that the motion was resisted not on any Constitutional point, but solely on a point of practice, viz: That after judgment new parties could not be made to a record.

Even in the elaborate petition for modification of the opinion filed May 5, 1896 (Rec. 238), wherein plaintiff in error reviewed and combated the doctrines of the opinion, no Federal question was raised; consequently it was waived. Even had the question been raised in the petition for modification it would have been waived, being too late, as has been often decided by this Court. Miller v. Texas, 153 U. S. 539; Bushnell v. Crooke Mining, &c., Co., 148 U. S. 689; Butler v. Gage, 138 U. S. 52; T. & P. R'y Co. v. South. Pac. Co., 137 U. S. 48; Pim v. St. Louis, &c., Co. 165 U. S. 273; Miller v. Railroad Co., 168 U. S. 131; Union, &c., Co. v. Kirchoff, 169 U. S. 103.

II.

The State Court did not decide that plaintiff in error was bound by the judgment without being a party to the suit or being heard; but held that, assuming "the facts therein (the amended petition) stated to be true, that Company was already a party defendant and bound by the judgment."

As appears in the STATEMENT, the record and admitted facts show not only that plaintiff in error had a hearing in this suit, but that it was substantially the only person that was heard. It had had a hearing for over eleven years when that opinion was delivered.

As is above shown, the suit was prosecuted vigorously from its commencement, October 12, 1885, an enormous record was accumulated, many thousands of dollars expended, the Louisville & Nashville R. R. Co.'s "President", "Auditor of Disbursements", "Assistant Comptroller", "Auditor of Receipts", etc., etc., were introduced as witnesses, and stated the account of earnings from its own books, and during all that time the L., C. & L. R'y Co., by the oath of M. H. Smith, President of the Louisville & Nashville Railroad Company, had not only made none of the earnings mentioned in the voluminous reports, but had not made "earnings of any kind;" and had not owned any railroad, or any "property of any character whatever" after November 1, 1881, nearly four years before this suit was instituted.

The facts, as admitted by the Louisville & Nashville R. R. Co. and recited by the Court of Appeals in its opinion (99 Ky. 147), were:

"That in November, 1881, after the execution of the lease and mortgage, and with actual notice and knowledge of the provisions thereof, the Louisville & Nashville Railroad Co. bought the property, road and franchise to operate same of the Louisville, Cincinnati & Lexington Railway Co., and received a deed therefor, which was duly recorded; that by that deed the lease of the Cumberland & Ohio was assigned and transferred to the Louisville & Nashville Railroad Co., and the latter company accepted the transfer and assumed the obligations thereof; that having theretofore purchased the capital stock of the Louisville, Cincinnati & Lexington Railway Co., the Louisville & Nashville Railroad Co. took and kept the whole purchase price of the road, and has since had possession of the roads, both the Cumberland & Ohio and Louisville, Cincinnati & Lexington Companies; has operated them and taken the earnings; has made the earnings shown in this case and ascertained in the judgments, which were described therein as the earnings of the Louisville, Cincin-

nati & Lexington Railway Co. that the Louisville & Nashville Co. not only knew the provisions of the lease and mortgage, but actually applied net earnings of the Louisville, Cincinnati & Lexington road in accordance therewith until April, 1883, and knew that the earnings referred to were made on the operations of the roads of the Cumberland & Ohio and Louisville, Cincinnati & Lexington companies; that the Louisville & Nashville Co. filed an answer herein in the name of the Louisville, Cincinnati & Lexington Co., employed counsel to make defense, and has controlled the defense in this case from the time of service of process."

Accordingly, it appears from the uncontroverted facts and previous proceedings, that the actual controversy and strife was between the plaintiff in error and defendants in error, for the L. C. & L. R'y Co. had parted with every vestige of property, and had only a nominal existence. That this fact was so well recognized by plaintiff in error that its own counsel in withdrawing from the defense of this suit, gave *to it* notice of the motion to strike their names from the docket as *its counsel*, and that its other counsel who are representing it in this Court, accepted the said notice in the name of the "Def't." It is, therefore, demonstrated that the contention of the existence of a Federal question is but an after-thought, and implies that the litigation extending throughout so many years was really no litigation, but a myth; that the record actually determines no question of property, not of the L. C. & L. R'y Co.'s property, for confessedly it never had any property after 1881, and not of defendants in error's property, because if its adversary was not bound, *it* was not bound.

Plaintiff in error, therefore, stands in this Court upon the contention that it has for nearly 14 years perpetrated a farce upon the Courts of Kentucky at enormous cost to the State, to defendants in error, and, undoubtedly, to plaintiff in error, with the deliberate purpose of procuring a judgment in the name of another, that would settle nothing. It is upon such contention as a basis that it now claims that rights guaranteed by the Federal Constitution have been infringed.

As aforesaid, the State Court did not bind plaintiff in error without a hearing, but basing its decision upon its previous decision in two cases, in which plaintiff in error was a party (for no other litigant ever raised such a question in Kentucky), viz: Louisville & Nashville Railroad Co. v. Hall, 12 Bush, 131, and Heckman v. Louisville & Nashville Railway Co., 85 Ky. 638, said:

"This appeal, therefore, presents two questions for decision. First, whether upon the facts alleged in the amended petition and disclosed by the Record, the Louisville & Nashville Railroad Co. is bound by the judgment herein to the extent that it received the net profits accruing from the lines of the Louisville, Cincinnati & Lexington Railway Co. out of business coming to it from or over the Cumberland & Ohio; and, second, if so, whether the proper procedure has been adopted to subject these earnings to the appellant's claim."

The Court further said, p. 155:

"In our view, the facts stated in the amended petition did not give the appellants the right to file a petition making the Louisville & Nashville Railroad Co. a party defendant to this litigation, for, upon the theory of that amendment, and considering the facts therein stated to be true, that Company was already a party defendant and bound by the judgment."

Regarding procedure, the Court said:

"The proper procedure, therefore, would have been either to institute a separate suit against the Louisville & Nashville Railroad Co., setting up the record in this suit and the facts connecting that Company with this litigation, or to proceed against the Louisville & Nashville Railroad Co. in this suit by rule based upon an affidavit, stating the facts set out in the amendment."

So, from the Court's own statement of the basis of its decision, it appears not only that plaintiff in error was not held bound by the judgment without a hearing, but that said plaintiff *in error*, upon facts which it admitted to be true, had defended a suit in the name of another company, and was for that reason bound by the judgment.

When plaintiff in error recognized, as the court finds it did recognize that the railroad earnings mentioned in the petition were the earnings of the properties acquired by it from the L., C. & L. R'y Co. it had the choice between petitioning the Court to be made a party defendant and asserting such defenses as it chose in its own name, and making in the name of the L., C. & L. R'y Co., such defenses as it might make in such name, under the doctrine settled previously by the Court of Appeals in Louisville & Nashville Railroad Co. v. Hall, 12 Bush, 138, and Heckman v. Louisville & Nashville Railroad Co., 85 Ky. 638. Plaintiff in error knew, for it was a party in both cases in which the doctrine was settled, that if it defended the suit in the name of the party to the record, it would be bound by the result, and, nevertheless, elected to defend in that name, and the State Court simply held, as it had held in the two previous cases, that plaintiff in error was bound by the result of the suit, and estopped by its own acts to deny that it was a party ligitant therein.

The question arising, therefore, upon the record is not a Federal question, but a question of general equity jurisprudence, viz., whether or not plaintiff in error was estopped by its own acts, admitted of record, to deny that it was a party to the suit. This question of estoppel was not a Federal question, as has been often decided by this court.

A case in point is Pierce v. Somerset Railway, decided October 31, 1898, Advance Sheets. The case was before this Court on a writ of error prosecuted by bondholders, who claimed that their rights were infringed by statutes enacted after the execution of their mortgage, authorizing the re-organization of the railroad company and the readjustment of its properties.

This Court, after stating the case, said:

"It is thus seen that there were two questions determined by the State Court: One related to the validity of the statutes passed subsequently to the execution of the mortgage, the court holding them valid, and that they did not impair the obligation of the contract contained in the mortgage. That is a Federal

question. The other related to the defense of estoppel on account of laches and acquiescence, which is not a Federal question. Either is sufficient upon which to base and sustain the judgment of the State Court. In such case a writ of error to the State Court can not be sustained. *Eustis v. Bolles*, 150 U. S., 361; *Rutland Railroad Co.* v. *Central Vermont Railroad Co.*, 159 U. S. 630; *Seneca Nation* v. *Christy*, 162 U. S. 283.

"A person may by his acts, or omission to act, waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a Federal one."

In Michigan v. Railroad Co., 152 U. S. 368, this Court said:

"The Supreme Court of Michigan held that the State might be estopped by its acts, conduct, silence, and acquiescence; that the only question necessary to be considered and determined was the question of estoppel; and, after a full consideration of the facts applicable to this branch of the case, reached the conclusion that the claim of the State had no foundation in equity, justice, or good conscience; that it had become stale; and that the State was estopped to assert title in itself to the lands in question. As its judgment thus rested upon the decision of a question which was not Federal, this Court has no jurisdiction to review it, and the writ of error must be dismissed. *Adams County v. Burlington & M. R. Co.*, 112 U. S. 123; Israel v. Arthur, *ante p.* 355. Writ of error dismissed."

Israel v. Arthur, *supra*, affords an excellent exemplification of the principles we invoke. Abbie A. Israel claimed the estate of John Arthur, as his widow. He had obtained a divorce which had been held void for want of jurisdiction of the Court decreeing it. John Arthur's representatives admitted the right of Abbie A. Israel to repudiate the divorce for want of process on her. She had remarried, however, after the decree, and the State Court held that by invoking the right of remarriage under the decree of divorce, she was estopped to assert the nullity of the decree for want of notice of the proceedings.

This court, after reciting that plaintiff in error admitted that conceding the invalidity of the divorce "the only question to be tried was whether she was 'estopped by her conduct as alleged in

said answer to dispute or contest the validity of said decrees, or whether she has ratified them by her conduct.'

"That question was determined against her, and the judgment rested solely on the ground that she could not under the facts be allowed, as to John Arthur's personal estate, to assert the property rights conferred by law upon a widow. To review that judgment would be to overhaul the application by a State court of principles of public policy and of 'estoppel, which it is not within our province to do. This was so held in *Marrow* v. *Brinkley*, 129 U. S. 178, and in effect in many other cases. *Adams County* v. *Burlington & M. R. Co.*, 112 U. S. 123; *Choteau* v. *Gibson*, 111 U. S. 200; *Beaupre* v. *Noyes*, 138 U. S., 397.

"In *Eustis* v. *Bolles*, 150 U. S. 361, it was ruled that a decision by the Supreme Judicial Court of Massachusetts that a creditor of an insolvent debtor, who proved his debt in insolvency proceedings under the State Statutes and accepted the benefits thereof, thereby waived any right he might otherwise have had to object to the validity of the insolvency statutes as impairing the obligation of contracts, presented no Federal question for review. And it has been often held, at least in actions at law, that this Court has no jurisdiction to revise the decision of the highest court of a State upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way. *Dower* v. *Richards*, *ante* p. 658, and cases cited.

"*Writ of error dismissed.*"

In Eustis v. Bolles, just cited, after reviewing the authorities, this court said, p. 368:

"The view of the court was that, when the composition was confirmed, Eustis was put to his election whether he would avail himself of the composition offer, or would reject it and rely upon his right to enforce his debt against his debtors, notwithstanding their discharge.

"In its discussion of this question the court below cited and claimed to follow the decision of this court in the case of Clay v. Smith, 28 U. S. 3 Pet. 411, where it was held that the plaintiff, by proving his debt and taking a dividend under the bankrupt laws of Louisiana, waived his right to object that the law did not constitutionally apply to his debt, he being a creditor residing in another State. But in deciding that it was competent for Eustis to waive his legal rights, and that accepting his

dividend under the insolvency proceedings was such a waiver, the Court below did not decide a Federal question. Whether that view of the case was sound or not is not for us to inquire. It was broad enough, in itself, to support the final judgment, without reference to the Federal question."

In Electric Co. v. Dow, 166 U. S. 489, this Court held that a decision of the State Court that a party electing to have damages assessed by a jury pursuant to the permission of a State statute was estopped to contest the validity of a provision of the statute for the addition of 50 per cent to the verdict did not present a Federal question.

See, also, San Francisco v. Itsell, 133 U. S. 65; Gillis v. Stinchfield, 159 U. S. 658; Bacon v. Texas, 163 U. S. 227, etc., etc.

From the principles settled in the foregoing cases it is demonstrable upon a bare perusal of the opinion of the Kentucky Court that this writ of error is not maintainable, and should be dismissed because the decision of the State Court was based upon a question of general equity jurisprudence sufficient to sustain the judgment of that court, independent of any Federal question which might have been raised or decided.

III.

The motion to dismiss should prevail also upon the ground that the decision of the State Court was based upon a question of procedure arising under the State practice.

In the opinion of January 14, 1898 (Appendix II), the Kentucky Court said:

"In our judgment the question presented by this appeal is one of procedure. This suit is essentially a proceeding *in rem* to subject to appellants' claim the net profits made on business coming to the line of the Louisville, Cincinnati & Lexington R'y Co. from and over the Cumberland & Ohio. If the averments of the affidavit are true, then the Louisville & Nashville R. R. Co. operated the Cumberland & Ohio, as well as the Louisville,

Cincinnati & Lexington R'y, by virtue of the sale to it of the latter's property and the assignment of the lease and contract, which it undertook to perform; received the net profits referred to; defended this suit in the name of the Louisville, Cincinnati & Lexington R'y Co.; and was a real defendant in this action. Assuming these averments to be true, the sole question is whether the appellants are required to bring a separate and additional suit against the Louisville & Nashville R. R. Co., making these averments and setting up the record in this case, or whether in this same suit the question may be determined upon response to rule whether or not the Louisville & Nashville R. R. Co. was a real defendant in this action.

"After a careful consideration of this question it seems to us that the question whether the Louisville & Nashville R. R. Co. has had its day in court in this suit can be as well determined in this suit as in another. If the Louisville & Nashville R. R. Co. is a party to this suit it is so because it has, as assignee of the contract and owner of the property of the Louisville, Cincinnati & Lexington Ry. Co., obtained the net earnings and conducted the defense of this suit, and the truth of these averments can be ascertained upon rule and response, and the payment of the earnings received be compelled as the production of mortgaged property might be compelled in ordinary proceedings to enforce liens.

"We deem it unnecessary to consider the question whether a personal judgment could have been rendered against the Louisville & Nashville R. R. Co. had it been a nominal defendant upon the averments of the original petition."

This decision of a question of procedure of the Kentucky Courts is not reviewable by this court, although it determined that the question whether or not plaintiff in error was a party to the suit by reason of its possession of the subject matter thereof and its acts in conducting the defense of said suit, etc., might be tried upon rule and response. The decision in Iowa Central Ry. Co. v. Iowa, 160 U. S. 389, is in point, and quite as strong a case in favor of jurisdiction as this, but the writ was dismissed.

The Central Iowa Ry. Co. had acquired the railroad of the Central Railway Co. of Iowa and leased it to the Burlington Co., which had taken exclusive possession thereof. Citizens of Northwood obtained an order of the Railroad Commissioners

that the Central Iowa Co. operate the road. The Court decreed compliance with the order, and enjoined the Burlington Co. from operation. Pending the litigation foreclosure proceedings were begun and completed in the Federal Court against the Central Iowa Ry. Co. The purchaser at foreclosure sale assigned to plaintiff in error. Afterward the Attorney General obtained a mandatory injunction against plaintiff in error to obey the order made against the Central Iowa Co. Plaintiff in error answered that it was no party to the suit wherein the order was made, that the Central Iowa Co. was virtually dead at the time, that plaintiff in error was not its successor, and that no injunction should go against it until after regular hearing. This Court said that no suggestion of a Federal question was made until in a brief, "in the 9th paragraph whereof it was claimed that it would be a violation of the 14th Amendment of the Constitution of the United States to grant the order prayed for upon the motion in question."

"It is apparent that this defense merely asserted that the rights of the corporation as a citizen of the United States would be impaired by enforcing the claim urged against it on the motion, instead of by another and less summary form of action. But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the State Court prosecuted or determined by one form of action instead of by another. It is also equally evident, provided the form sanctioned by the State law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words. Whether the Court of last resort of the State of Iowa properly construed its own Constitution and laws in determining that the summary process under those laws was applicable to the matter which it adjudged, was purely the decision of a question of State law, binding upon

this Court. Mere irregularities in the procedure, if any, were matters solely for the consideration of the judicial tribunal within the State empowered by the laws of the State to review and correct errors committed by its Courts. Such errors affect merely matters of State law and practice in no way depending upon the Constitution of the United States or upon any act of Congress. Ludeling v. Chaffe, 143 U. S. 301, 305."

The ruling in this case is conclusive of the case at bar, for the contention in each case was that the proceeding against the plaintiff in error to compel it to perform a judgment which it claimed was rendered against another person was without due process of law. The difference between the cases is that in the case cited the purchaser had never been heard, but in this case the Louisville & Nashville R. R. Co. was practically the only party that ever had been heard. We submit the question without further argument. See, also, Wilson v. North Carolina, 169 U. S. 586; McQuade v. Trenton, advance sheets, decided January 30, 1899.

IV.

The Question Which Plaintiff in Error Attempts to Raise has Long Been so Conclusively Settled Against its Contention that it is no Longer Open for Argument.

Its contention is that although it actively carried on a litigation for many years with defendants in error over property which it claimed to own, and denied the right of defendants in error to subject it to the payment of their claim, it is not bound by the litigation because it was not named as a party to the record, but defended the suit in the name of a corporation which had parted with every thing except its name years before the institution of the suit.

The obvious answer to its contention is:

1. This proceeding being in its nature *in rem*, to subject the earnings or profits of property within its territory, the question

of procedure, including that of notice to the parties to be bound by the judgment or decree, is exclusively within the control of the State, personal notice not being required to constitute due process of law, as in actions *in personam.*

2. Due proces of law does not forbid a person being bound by the judgment in a case in which it has controlled the defense in the name of a party appearing of record.

(*a*)

The judgment affirmed in the Court of Appeals did not purport to bind plaintiff in error, except "to the extent that it received the net profits accruing from the lines of the Louisville, Cincinnati & Lexington Railway Company out of business coming to it from or over the Cumberland & Ohio." (99 Ky. 149.)

Accordingly, to subject such "net profits accruing from the lines," etc., the proceeding, *which was one to enforce the mortgage*, was in its nature *in rem*, and it was so held in this suit. The Court said, as above quoted: "In our judgment the question presented by this appeal is one of procedure. This suit is essentially a proceeding *in rem* to subject to appellants' claim the net profits made on business coming to the line of the Louisville, Cincinnati & Lexington Railway Company from and over the Cumberland & Ohio."

The case, therefore, is one in which it was conceded in Pennoyer v. Neff (95 U. S. 718) that formal personal notice or summons was not indispensable to due process of law. The language used was:

"So the State, through its tribunals, may subject property situated within its limits, owned by non-residents, to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled."

Regarding "substituted service by publication," this Court said:

"Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or

of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*," etc.

These principles are too familiar to admit of our further discussion of them.

That the decision of the State Court that this suit is a proceeding *in rem* within the doctrine of Pennoyer v. Neff is sound is too obvious for argument; but if it were doubtful, the adjudication of the State Court as to the nature of the proceeding is conclusive. In Wood v. Brady, 150 U. S. 23, this court said:

"The question whether an action to foreclose a lien of this kind is *in rem* or *in personam*, under the practice in California, is one upon which the decision of the Supreme Court is binding, and its ruling that plaintiff, being no party to defendant's suits to foreclose, had a right to show by evidence *aliunde* the invalidity of the judgments obtained by them, is not a proper subject for review by this court.

"In no aspect does the case present a Federal question, and the writ is, therefore, dismissed."

(*b*)

The doctrine asserted for the *third* time, by the State Court (99 Ky. 149) as established in Kentucky, is supported by authority practically unanimous, as is shown in the opinion itself; see appendix I.

The same doctrine is asserted to be sound by the text-writers, Freeman on Judgments, Sec. 175; Black on Judgments, Secs. 539, 540; Herman on Estoppel, Sec. 156; Van Fleet Form. Adj., Sec. 523; Jones on Evidence, Sec. 602; 12 A. & E. Ency. 97; 21 *Ibid.* 177.

The *consensus* of opinion is that the doctrine does not violate the constitutional guaranty of due process of law.

The opinion in this suit cites and relies for its support, among other authorities, upon Lovejoy v. Murray, 3 Wall. 1, and Robbins v. Chicago, 4 Wall. 657.

In those cases this Court announced the doctrine of the Kentucky Court, and did not intimate that it violated the constitutional guaranty of due process of law.

In Lovejoy v. Murray, the sheriff claimed that the judgment against him was conclusive of his right against the principal and sureties in a bond of indemnity given him to procure the seizure of property. This Court, deciding affirmatively, said, 3 Wall. 18:

"The third question is whether the judgment of plaintiff against the sheriff, Hayden, is conclusive against the defendants in this action.

"The facts on which this proposition is based are the giving of the bond of indemnity by the defendants, and that Hayden, when sued, notified them of the suit, and called on them to defend it; that they did employ counsel to defend it, and that the counsel so employed had exclusive control of the defense of said suit.

"The legal facts necessary to enable plaintiff to recover in the present suit are, first, his title to the goods which had been converted; second, the value of those goods; and, third, the participation of the defendants in the conversion. The latter point, we have already seen, is established by the indemnifying bond to the sheriff. Does the record of the judgment against Hayden conclusively establish the other two points, under the circumstances just stated?

"We are of opinion that it does.

"We have already shown that the effect of giving the bond was to make defendants principals in the transaction, and that so far as the action of the sheriff after that was a trespass, it was directed by them, and was for their benefit. With a just appreciation of their relations to each other in the transaction, he called on them, when sued, to assume the defense; and they did so. They were defending their own acts, although the suit was in the sheriff's name. They had full right to make all defense there which they could make here. They could adduce witnesses, and cross-examine those of plaintiff, and could have taken an appeal. The case is wanting in none of the elements so happily stated by Mr. Greenleaf, as rendering a former judgment conclusive in a second suit. 'Justice requires,' he says, 'that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question and between the same parties, should be closed forever. It is also a most obvious principle of justice, that no man

ought to be bound by proceedings to which he is a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger, he may well be bound. Under the term 'parties' in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense or to control the proceedings; and to appeal from the judgment. This right involves, also, the right to adduce testimony and to cross-examine the witnesses adduced on the other side. Persons not having these rights are strangers to the cause. But to give full effect to the principle of which parties are held bound by a judgment, all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings.' 'The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party, is, that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded.' 1 Greenleaf Ev., Sections 522, 523. The authorities cited by the learned author fully sustain these propositions.

"The present case comes within them, and must be governed by them. In addition, the following cases have been examined, which affirm the conclusiveness of former judgments, under circumstances which we are unable to distinguish, in principle, from the one before us, and in several instances the analogy in the facts is perfect. Ferrers v. Arden, Cro. Eliz. 668; Kennersley v. Orpe, Dougl. 517; White v. Philbrick, 5 Me. 147; Rapelye v. Prince, 4 Hill, 119; Calkins v. Allerton, 3 Barb. 173; Glass v. Nichols, 35 Me. 328; Castle v. Noyes, 14 N. Y. 329; Warfield v. Davis, 14 B. Mon. 41.

"This last question must, therefore, be answered in the affirmative.

"As the rulings of the Circuit Court were in accordance with the principles here decided, the judgment of that court must be affirmed, with costs."

In Robbins v. Chicago, this court, on the authority of Lovejoy v. Murray, held that Robbins, who had excavated an area in a street, when sued by the city, was bound by the amount adjudged against the city in an action against it for damages for personal injury of one falling into the area.

Robbins was not a party of record in the action against the city; and in adjudging that he was bound by the judgment in that action, this Court said:

"Evidence in the record shows that the defendant knew that the party was injured by falling into the excavation, and that the action against the corporation was commenced; that he was informed of the day of trial, that he was requested to assist in procuring testimony, and that he actually wrote to a witness upon the subject," etc., etc. . . .

"Surely it can not be doubted that the evidence justified the instructions of the Court, and, it might be added, if need be, that it fully warranted the finding of the jury."

It is unnecessary to say that these two authorities fully sustain the doctrine of the Kentucky Court, and preclude argument in this Court.

If a case ever reached a Court illustrating the wisdom of the rule announced by this Court, just invoked, this suit is that case, for to renounce the rule would nullify nearly fourteen years of as fierce and laborious litigation as can be found.

Accordingly, we ask that our motion be sustained.

Respectfully submitted,

EDMUND F. TRABUE,
Counsel for Defendants in Error.

JAMES S. PIRTLE,
Of Counsel.

APPENDIX I.

KENTUCKY COURT OF APPEALS.

ADOLPH SCHMIDT, &c., - - - *Appellants*,

VERSUS

LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO., &c., - *Appellees*.

Appeal from the Jefferson Circuit Court—Law and Equity Division.

(99 Ky. 143; 18 Ky. L. R. 65.)

(*Filed April* 4, 1896.)

Opinion of the Court delivered by Judge DuRelle:

"The appellant, Schmidt, over ten years ago, as trustee under the mortgage executed by the Northern Division of the Cumberland & Ohio Railroad Company, brought suit against the Louisville, Cincinnati & Lexington Railway Company upon a contract of lease between the Cumberland & Ohio Railroad Co. and the Louisville, Cincinnati & Lexington Railway Co., whereby the former company leased its railroad to the latter for thirty years, and the latter company, in the event that the net earnings of the leased road were insufficient to pay the interest and provide a sinking fund for the payment of the mortgage bonds issued by the Cumberland & Ohio Railroad Company, undertook to supply the deficiency by applying to the purpose so much as might be necessary of the net earnings of its own lines, earned from business coming to it from or over the lines of the Cumberland & Ohio Railroad Co. The facts of the case are fully stated in the opinion of this Court upon the former appeal by Schmidt, Trustee, against Louisville, Cincinnati & Lexington Railway Co., reported in 95th Kentucky, 289, but by some mistake entitled in the Report 'Schmidt, Trustee, v. Louisville & Nashville Railroad Co.' For the facts up to the date of the former appeal, it is unnecessary to do more than refer to that opinion.

"After the reversal of the case on that appeal, an order was duly entered in accordance with the opinion, requiring the Louisville, Cincinnati & Lexington Railway Co. to pay into Court the sum of $53,565.62, with interest, on or before June 11, 1894, and a rule was awarded against the Company to pay in that sum

and interest. To this rule the Company filed a response, stating 'that in 1881 it sold and conveyed for a consideration paid at the time, all its property, rights, privileges and franchises, except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since that time it has had no property, assets or funds of any kind with which to comply with the order of this Court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it.' Another rule was awarded against the company to report the amount of its net earnings on business coming to it from or over the Cumberland & Ohio Railroad since the date of the last net earnings reported by the commissioner's report, which was confirmed in accordance with the opinion of this Court on the former appeal. In response to this rule, the Company said 'that it has not made any net earnings, or earnings of any kind, since the date aforesaid' (the time of the net earnings reported in report 'R. E. S. No. 2') 'on business coming to it from or over the Cumberland & Ohio road, nor has it made earnings of any kind, since it does not own any railroad or property of any character, whatever, and has not since the date aforesaid.'

"Motions to strike these responses from the files, and to make them more specific, were overruled. Thereupon the plaintiffs filed a reply to the responses, denying the statements contained in them and averring that the Louisville, Cincinnati & Lexington Railway Co. had never made any legal or other sale of its railroad property, and that the road had been continuously operated in the name of said defendant. Subsequently the plaintiffs asked leave to withdraw the reply to the responses of the Louisville, Cincinnati & Lexington Railway Co., and moved to file an amended and supplemental petition making the Louisville & Nashville Railroad Co. a party defendant.

"The amendment tendered sets out the execution and term of the lease, contract, and mortgage relied on in the previous litigation, avers default in the payment of interest on the bonds in 1886 and subsequently, and charges that net earnings of the Cumberland & Ohio Railroad came into the hands of the Louisville, Cincinnati & Lexington Railway Co. which were not applied to the payment of interest, and that all the sources of the Cumberland & Ohio Railroad for raising money having failed to provide sufficient funds to pay interest on the bonds, it was necessary to appropriate to that purpose the net earnings of the Louisville, Cincinnati & Lexington Railway Co. arising out of business coming to it from or over the lines of the Cumberland & Ohio.

"It further alleges that in November, 1881, after the execution of the lease and mortgage, and with actual notice and knowledge of the provisions thereof, the Louisville & Nashville Railroad Co. bought the property, road and franchise to operate same of the Louisville, Cincinnati & Lexington Railway Co., and received a deed therefor, which was duly recorded; that, by that deed, the lease of the Cumberland & Ohio was assigned and transferred to the Louisville & Nashville Railroad Co., and the latter company accepted the transfer and assumed the obligations thereof; that having theretofore purchased the capital stock of the Louisville, Cincinnati & Lexington Railway Co., the Louisville & Nashville Railroad Co. took and kept the whole purchase price of the road, and has since had possession of the roads of both the Cumberland & Ohio and Louisville, Cincinnati & Lexington Companies; has operated them and taken the earnings; has made the earnings shown in this case and ascertained in the judgments, which were described therein as the earnings of the Louisville, Cincinnati & Lexington Railway Co.; that the Louisville & Nashville Company not only knew the provisions of the lease and mortgage, but actually applied net earnings of the Louisville, Cincinnati & Lexington road in accordance therewith, until April, 1883, and knew that the earnings referred to were made on the operations of the roads of the Cumberland & Ohio and Louisville, Cincinnati & Lexington Companies; that the Louisville & Nashville Company filed an answer herein in the name of the Louisville, Cincinnati & Lexington Company, employed counsel to make defense, and has controlled the defense in this case from the time of service of process. The amendment further avers that, until the responses to the rules herein were filed, the plaintiffs did not know of the control by the Louisville & Nashville Company over the roads of the other two companies, and that it was plaintiffs' intention in bringing this suit to sue the company or companies operating these roads, and which had made the earnings referred to.

"The prayer is, that the Louisville & Nashville Railroad Co. be made a party defendant, for judgment against it; for the subjection of the earnings made on these roads, in accordance with the terms of the lease and mortgage, to the payment of the mortgage debt, and, inasmuch as the Louisville & Nashville Railroad Co. has made the defense in this suit, and, after judgment, has attempted to thwart the collection thereof, that a receiver be appointed to take charge of and operate the properties acquired by the sale, and to apply the earnings according to the judgment of this court.

"The motions to withdraw the reply to the responses, and to

file this amendment, were overruled by the lower court, and from that judgment this appeal has been taken.

"It is earnestly contended by counsel for appellants that the rule laid down in Heckman v. Louisville & Nashville Railroad Co., 85 Ky. 638, following and amplifying the doctrine announced in Louisville & Nashville Railroad Co. v. Hall, 12 Bush, 131, applies to this case, and is decisive of it. Appellants claim that the Louisville & Nashville Railroad Co. was the real defendant in this case, made the defense in the name of the Louisville, Cincinnati & Lexington Railway Co., and is bound by the judgment.

"This appeal, therefore, presents two questions for decision: first, whether upon the facts alleged in the amended petition and disclosed by the record, the Louisville & Nashville Railroad Co. is bound by the judgment herein to the extent that it received the net profits accruing from the lines of the Louisville, Cincinnati & Lexington Railway Co. out of business coming to it from or over the Cumberland & Ohio; and, second, if so, whether the proper procedure has been adopted to subject these earnings to the appellant's claim.

"Upon the first question there is little difficulty. Assuming the statements of the amended petition to be true (and, for the purposes of this appeal, we must so presume), together with the facts disclosed by the record, it appears that the Louisville, Cincinnati & Lexington company had no railroad, property, or means to conduct a defense; that it had only the franchise to exist, and that the Louisville & Nashville Railroad Co., by its officers and agents, took charge of the defense of this case, controlled it, employed counsel, produced evidence, and paid the expenses of the nominal defendant in the suit. The record discloses that Mr. R. E. Sewell, who made the report upon which the judgment was based, made affidavit 'that as the Auditor of the Louisville & Nashville Railroad Co., he superintends all work of a similar kind of the Louisville, Cincinnati & Lexington Railway Co., defendant herein, and all like statements rendered herein heretofore by said defendant have been made under his superintendency.' Numerous reports were filed in response to rules taken against the Louisville, Cincinnati & Lexington Railway Co. by the officials who were also officials of the Louisville & Nashville Railroad Co., stating earnings as having accrued to the Louisville, Cincinnati & Lexington Railway Co. from business coming to it from or over the lines of the Cumberland & Ohio.

"In our opinion, the law is well settled that, if the statements of the amendment tendered are true, the Louisville & Nashville

Railroad Co. is bound by the judgment against the Louisville, Cincinnati & Lexington Railway Co.; and in any litigation between the Louisville & Nashville company and the plaintiffs in this suit, the record of this suit might be introduced, with evidence showing the truth of the averments of the amended petition. In the case of Louisville & Nashville Railroad Co. v. Hall, the company was sued by the wrong name, and it was held that, as the company failed to plead further, and failed to disclose its true corporate name, it could not complain that the judgment was rendered against it in the name by which it had been sued. In the case of Heckman v. Louisville & Nashville Railroad Co., 85 Ky. 638, a suit was brought against the Louisville, Cincinnati & Lexington Railway Co. for an injury which was inflicted by the Louisville & Nashville Railroad Co. After a period of more than one year from the date of the injury, an amended petition was filed, stating that, by mistake, the defendant was styled the Louisville, Cincinnati & Lexington Railway Co., when it should and was intended to be the Louisville & Nashville Railroad Co., which was the correct name of the defendant sued and intended to be sued in the action, and praying that the defendant be required to defend by its correct name of the Louisville & Nashville Railroad Co., and for judgment against it. In that case the Court held that the Louisville & Nashville Railroad Co. had entered its appearance and made defense to the action within one year from the date of the injury, therefore the statute of limitation could not apply, though, in fact, the only answer filed up to that time was in the name of the Louisville, Cincinnati & Lexington Railway Co. The Court in that case said:

"'In our opinion, not only according to unvarying authority on the subject, but on the principle of estoppel and common fairness, when a part enters his appearance and makes his defense to an action, he can not afterwards complain of the judgment that may be rendered against him, upon the ground that he was sued by the wrong name, or what is practically the same thing, that the name of a different person was inserted in the caption of the petition and in the summons; and it, therefore, necessarily follows that the action must be regarded as commenced and actually pending against him, at least from the time he so enters his appearance, if not from the time he is served with the summons.'

"In the case of Eagle, &c., Company v. Bradley, &c., Company, 50 Fed. Rep. 193, suit was brought for an infringement of a patent, not against the firm which manufactured the articles,

but against a branch of that firm. The firm which manufactured the articles conducted the defense and was defeated, and the decree in that case was held binding upon the firm which conducted the defense. Judge Blodgett, in delivering the opinion, cited Robbins v. Chicago, 4 Wallace, 657; Claflin v. Fletcher, 7 Fed. Rep, 851, and said:

"'The conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. . . . Parties in that connection include all who are directly interested in the subject matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. And this same rule is restated and followed in numerous cases, among which are Beloit v. Morgan, 7 Wall. 619; Miller v. Liggett, etc., Co., 7 Fed. Rep. 91; Claflin v. Fletcher, *Id.* 851; American Bell Tel. Co. v. National Imp. Tel. Co., 27 Fed. Rep. 666; Morse v. Knapp, 37 Fed. Rep. 352; Lea v. Deakin, 11 Biss. 23, 13 Fed. Rep. 514; Wilson's Ex'rs v. Deen, 121 U. S. 525; 7 Sup. Ct. Rep. 1004.

"'The proof in this case shows beyond doubt that the defendant in this case, with the consent of the defendants in the Iowa case made itself the *dominus litus* in that case; it controlled the defense; appeared by its own attorneys; it was the manufacturer of the plows in which the alleged infringement was found; and may, I think, with entire propriety, be held to be bound, not only upon all questions which were raised and determined in the former case, but upon all which might have been raised and determined in that case. The Hague patent itself was considered by the Iowa court, and not held to be an anticipation or protection as against the complainant's patents. The defendants may, I think, be considered as bound, but all which it could have appropriately put into the record in that case, including the testimony, which it is claimed would carry the Hague invention back of the Wright invention.

"'I am, therefore, of opinion that all the defenses which are urged here have been anticipated and are cut off by the decree in the Iowa case. A decree will, therefore, be entered, finding that the defendant infringed as charged, and for an injunction and accounting.'

"The judgment in that case was affirmed by the Court of Appeals, 7th Circuit, 57 Fed. Rep. 981.

"The Court said:

"'The suit in the Circuit Court of the United States for the Southern District of Iowa was brought to restrain the infringement of the same claims of the same patent here in question. The defendant there was the agent of the present appellant in the sale of the infringing machines. The defense of the suit there was assumed and prosecuted by the appellant here. The appellant was, in fact, the real party to that litigation, and so far as the decree there is *res adjudicata*, is as effectively concluded thereby as if it were the actual defendant to the record. Lovejoy v. Murray, 3 Wall. 1, 18, 19; Robbins v. Chicago, 4 Wall. 657, 672.'

"In Landes v. Hamilton, 77 Missouri, 565, the Court said:

"'It is not always essential to the creation of an estoppel that the person should be a party to the record, but one who thus instigates and promotes the litigation for his benefit by employing counsel, binding himself for costs and damages, will be bound by the litigation or procedure as much as the party to the record.'

"In Estell v. Peacock, 48 Mich. 471, an action was instituted on a note given plaintiff by defendant for logs. A stranger who had licensed plaintiff to cut the logs, but had undertaken to revoke the license before plaintiff sold the logs and accepted the note, notified the defendant not to pay plaintiff the amount of the note, whereupon defendant permitted the stranger to defend the action in defendant's name. It was held, Judge Cooley delivering the opinion, that the stranger was bound by the judgment, although not a party.

"In Bennett v. Wilmington Star Mining Company, 18 Ill. App. 17, the Court citing Cole v. Favorite, 69 Ill. 457, announced the principle:

"'Persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person fall within this category; and in such cases parol evidence is admissible to show who are the real parties in interest, and that they conducted the litigation in the name of other parties.'

"In Valentine v. Mahoney, 37 Cal., plaintiff brought suit in ejectment. Defendant introduced the record of a suit between himself and the tenant of plaintiff's grantor in which the

grantor, being the landlord, defended the suit in the tenant's name. It was held that the landlord, plaintiff's grantor, was bound by the judgment in the suit between the tenant and the present defendant, although not a party, because he conducted the defense, and that the plaintiff took subject to the infirmities of his grantor's title. The Court holding the record admissible, said:

"'Would it not be an anomaly in practice to permit a person after defending an action upon a particular issue, and immediately thereafter to litigate the same matter in another action with the same adversary in total disregard of the judgment in the former action? The judgment is conclusive both upon the landlord and tenant in the subsequent action between them involving the issue of eviction of the tenant by virtue of the judgment.'

"In Stoddart v. Thompson, 31 Iowa, 801, the Court said:

"'One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and doing those things which are usually done by a party, will be bound by the judgment rendered therein.'

"To the same effect see also: Palmer v. Hayes, 112 Ind. 292; Wood v. Ensel, 63 Mo. 193; Strong v. Phœnix Ins. Co., 62 Mo. 289; Cole v. Favorite, 69 Ill. 457; Linton v. Harris, 78 Ga. 265; Lovejoy v. Murray, 3 Wall. 1; Warfield v. Davis, 14 B. M. 41; Freeman on Judgments, Secs. 174-5.

"Upon the second question, whether the procedure adopted is correct, appellee's counsel rely principally upon the cases of Brown v. Vancleave, 86 Ky. 381, and Meadows v. Goff, 90 Ky. 541.

"In the former case the actual question decided was, that after a judgment in favor of the plaintiff, and the receipt by him of the amount of the judgment in satisfaction thereof, his demand was satisfied and his right to appeal barred.

"In the latter case this Court held that, after a final judgment settling a controversy between two litigants, it was too late for a third person to file a petition to be made a party to the suit and set up a claim to the property in controversy.

"Neither of these cases seems to apply directly to the case at bar. But we are of opinion that, after the appeal and judgment in this case, it would be too late to bring into this litiga-

tion one who was neither a party to the Record nor bound by the judgment. In our view, the fact stated in the amended petition did not give the appellants the right to file a petition making the Louisville & Nashville Railroad Co. a party defendant to this litigation, for, upon the theory of that amendment, and considering the facts therein stated to be true, that Company was already a party defendant and bound by the judgment. The proper procedure, therefore, would have been either to institute a separate suit against the Louisville & Nashville Railroad Co., setting up the record in this suit and the facts connecting that Company with this litigation, or, to proceed against the Louisville & Nashville Railroad Co. in this suit by rule based upon an affidavit stating the facts set out in the amendment.

"Proceedings in this litigation were not ended by the judgment rendered after the last appeal. Undoubtedly the appellant could not only take steps to enforce the satisfaction of the judgment then rendered, but they could proceed to subject net earnings accruing to the Louisville, Cincinnati & Lexington Railway Co. (if that Company had been the real defendant), since the last net earnings reported before the report 'R. E. S. No. 2' was made. So, too, they may, in our judgment, proceed in this litigation to subject those earnings in the hands of the Louisville & Nashville Railroad Co., if it be, as alleged in the amended petition, the real party defendant in this suit. Wiggins Co. v. O. & M. R'y Co., 142 U. S. 292. This question, while not strictly before the Court upon this appeal, has been considered and decided, to the end of preventing needless litigation.

"Wherefore, the judgment is affirmed."

SIMRALL, BODLEY & DOOLAN,
PIRTLE & TRABUE,

For Appellant.

HELM & BRUCE,

For Appellee.

COURT OF APPEALS.

ADOLPH SCHMIDT,

VERSUS

LOUISVILLE, CINCINNATI & LEXINGTON RAILWAY CO.

Court's response to petition for modification.

(*June* 17, 1896.)

"The petition for modification has been carefully considered, and while it is true that the appellee, the Louisville, Cincinnati & Lexington Railway Company, has no interest in the matters in regard to which a modification of the opinion is sought by it, it is, perhaps, also true that the opinion went too far in stating that the questions were *decided* which were not strictly before the Court upon the appeal. It has been the custom of courts, since opinions were written, to state the existence of a remedy which was sought as a reason for denying the remedy which was not sought. In thousands of cases it has been stated that the relief sought in equity was denied because an adequate remedy at law existed. This, however, is universally considered, and properly so, to be stated *arguendo*, and the opinion in this case should have been confined in that respect to stating, as argument, that the Louisville & Nashville Railroad Company was bound by the judgment, if the matters stated in the tendered amended petition were true, and without indicating the exact course of procedure to be adopted.

"To the extent herein indicated, the opinion is modified."

(A copy.)

APPENDIX II.

SCHMIDT, &c., v. LOUISVILLE, CINCINNATI & LEXINGTON R. R. CO., &c.

(19 Ky. Law Rep. 1626; 44 Southwestern R. 130.)

(*Filed January* 14, 1898.)

Opinion of the court by Judge DuRelle:

"This case has been to this court upon three former appeals. It is unnecessary to state the facts in detail in this opinion, as they are fully stated in the opinions reported in 95 Ky. 289, under the style of Schmidt v. Louisville & Nashville R. R. Co., and in Schmidt v. Louisville, Cincinnati & Lexington Ry. Co., 18 Ky. Law Rep. 65. In the former case the amount of net earnings resulting from business coming to the line of the Louisville, Cincinnati & Lexington Ry. Co. from or over the Cumberland & Ohio road was ascertained. In the latter case the question was presented whether an amended petition could be filed making the Louisville & Nashville R. R. Co. a party to the suit after a judgment had been rendered against the Louisville, Cincinnati & Lexington Ry. Co. subjecting to the claim of plaintiffs the net earnings ascertained to have been made from the business before referred to, and in that case it was held that such petition could not be filed, for the reason and upon the ground that, if the Louisville & Nashville R. R. Co. was not a party to the record nor bound by the judgment, it was too late to bring it into the litigation, and if the facts stated in the amended petition tendered were true, that company was already a party defendant and bound by the judgment. Upon the return of the case to the trial court appellants filed an affidavit, stating substantially the same facts which had been stated in the amended petition before tendered; and upon that affidavit, and upon the whole record, asked a rule against the Louisville & Nashville R. R. Co. to pay into the court the amount of net earnings ascertained, and, further, moved to refer the case to a commissioner to ascertain what net earnings had been made subsequent to the report of the commissioner, which was confirmed by the judgment entered in pursuance of the opinion in Schmidt v. Louisville, Cincinnati & Lexington Ry. Co., 18 Ky. Law Rep. 65.

"In our judgment the question presented by this appeal is one of procedure. This suit is essentially a proceeding *in rem* to subject to appellants' claim the net profits made on business coming to the line of the Louisville, Cincinnati & Lexington Ry. Co. from and over the Cumberland & Ohio. If the averments of the affidavit are true, then the Louisville & Nashville R. R. Co. operated the Cumberland & Ohio, as well as the Louisville, Cincinnati & Lexington Ry., by virtue of the sale to it of the latter's property and the assignment of the lease and contract, which it undertook to perform; received the net profits referred to; defended this suit in the name of the Louisville, Cincinnati & Lexington Ry. Co.; and was a real defendant in this action. Assuming these averments to be true the sole question is whether the appellants are required to bring a separate and additional suit against the Louisville & Nashville R. R. Co., making these averments and setting up the record in this case, or whether in this same suit the question may be determined upon response to rule whether or not the Louisville & Nashville R. R. Co. was a real defendant in this action.

"After a careful consideration of this question it seems to us that the question whether the Louisville & Nashville R. R. Co. has had its day in court in this suit can be as well determined in this suit as in another. If the Louisville & Nashville R. R. Co. is a party to this suit it is so because it has, as assignee of the contract and owner of the property of the Louisville, Cincinnati & Lexington Ry. Co., obtained the net earnings and conducted the defense of this suit, and the truth of these averments can be ascertained upon rule and response, and the payment of the earnings received be compelled as the production of mortgaged property might be compelled in ordinary proceedings to enforce liens.

"We deem it unnecessary to consider the question whether a personal judgment could have been rendered against the Louisville & Nashville R. R. Co. had it been a nominal defendant upon the averments of the original petition.

"It is sufficient to say, in passing upon the sufficiency of the affidavit, as it would be in passing upon the sufficiency of a petition, that, if the facts stated are true, the Louisville & Nashville R. R. Co. may be compelled to pay over the net earnings which it has received. On the other hand, if the averments of the affidavit are not true, as counsel strenuously insist, the Louisville & Nashville R. R. Co. can not be hurt, for the truth can be made to appear, and if that company is not a real party to the suit it is not bound by the judgment.

"It is sought to distinguish this case from the Heckman case,

85 Ky. 638, and the Hall case, 12 Bush, 131, upon the ground that those cases were suits for torts committed by the Louisville & Nashville R. R. Co., with which no other company was connected. In this suit the complaint is that net profits were not paid over to appellants, but withheld from them. From the affidavit it appears that the Louisville, Cincinnati & Lexington Ry. Co. was not connected with the transaction, but that the Louisville & Nashville R. R. Co., which owned the property of the former company, and was its assignee, was not only connected with the transaction, but actually withheld the net profits and defended the suit in the name of the Louisville, Cincinnati, & Lexington Ry. Co.

"Counsel in the brief say: 'The remaining cases cited by this court in its opinion may be divided up into the following classes:

"'First. Those in which the agent of the real party was sued, and the real party defended the suit in the name of the agent. In each of these cases the right involved was the right of the real defendant. In neither of these cases was the nominal defendant in the slightest interested; his only interest was to defend the right of his principal, and the principal having taken charge of the defense, and that precise question having been litigated, the court held that in a subsequent case the real party was concluded by the finding of the court.

"'Into this class falls the case of Eagle, &c., Co. v. Bradley, &c., Co., 50 Fed. Rep. 193; S. C., 57 Fed. Rep. 981; Wood v. Ensel, 63 Mo. 193; Palmer v. Hays, 112 Ind. 292; Warfield v. Davis, 14 B. M. 41; Clafflin v. Fletcher, 7 Fed. Rep. 851.'

"It seems to us that the analogy is well nigh perfect between the case of a principal defending in the name of his agent a suit in which relief was sought against the agent, and the case of an assignee defending in the name of his assignor a suit in which relief is sought against the assignor. In each case the real and only party in interest, the party by whose procurement and for whose benefit the wrong was committed, is not a party to the record. In the one case the real party is held bound by the judgment. Why not in the other? Indeed the averments of the affidavit come very close to making out a case of agency.

"Much stress is laid upon the case of Allin v. Hall, 1 Marshall, 525, as holding that only parties to a suit or their privies are barred by the judgment therein. While under the facts of that case it may well be doubted if the same conclusion would be reached to-day, in the light of the later doctrine, no one disputes the correctness of the general rule there stated. On the other hand, we do not understand counsel to dispute the modern doctrine that persons may be bound by a judgment who are neither

parties of record nor their privies. The question here is whether the Louisville & Nashville R. R. Co. is a real party.

"Many other questions are raised in the brief which were raised and considered upon the former hearings, and are, therefore, not referred to here.

"Judgment reversed and cause remanded for further proceedings in accordance with this opinion."

No. 1178.

Brief of Simrall for M. & O. R.R. Co.

FILED
APR 1 1899
JAMES H. McKENNEY

Filed April 1, 1899.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

THE LOUISVILLE & NASHVILLE R. R. COMPANY,
Plaintiff in Error,

VERSUS

A. L. SCHMIDT, in his own behalf and as Trustee of the Bondholders of the Northern Division of the Cumberland & Ohio Railroad Company et al.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS OR AFFIRM.

JOHN G. SIMRALL,
For Defendants in Error.

EDMUND F. TRABUE,
TEMPLE BODLEY,
JOHN C. DOOLAN,
BENJAMIN F. WASHER,
Of Counsel.

JOHN P. MORTON & CO., PRINTERS, LOUISVILLE.

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 656.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

VERSUS

A. L. SCHMIDT, IN HIS OWN BEHALF AND AS TRUSTEE OF THE BONDHOLDERS OF THE NORTHERN DIVISION OF THE CUMBERLAND & OHIO R. R. COMPANY ET AL.,
Defendants in Error.

NOTICE OF MOTION TO DISMISS OR AFFIRM.

Plaintiff in error, the Louisville & Nashville Railroad Company and its counsel, James P. Helm and Helm Bruce, will take notice that on Monday, the 3d day of April, A. D. 1899, at the court room of the Supreme Court of the United States, in the city of Washington, D. C., at or about the hour of twelve o'clock M., at motion hour of the court, the defendants in error will move the said court to dismiss the writ of error in the above entitled cause for want of jurisdiction in the court, and will, also, move said court to affirm the judgment to which said writ of error purports to have been prosecuted on the ground that it is manifest that the said writ of error was taken for delay only; and manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument; as is fully set out in the

motion and the briefs of John G. Simrall and Edmund F. Trabue, counsel for defendants in error, copies of which are delivered with this notice.

JOHN G. SIMRALL,
EDMUND F. TRABUE,
Counsel for Defendants in Error.

As counsel for plaintiff in error, I acknowledge service of the within notice, and receipt of copy of the motion referred to, and copies of the briefs of John G. Simrall and Edmund F. Trabue, counsel for defendants in error, this, the Eleventh day of March, A. D. 1899.

JAMES P. HELM,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 656.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

VERSUS

A. L. SCHMIDT, IN HIS OWN BEHALF AND AS TRUSTEE OF THE BONDHOLDERS OF THE NORTHERN DIVISION OF THE CUMBERLAND & OHIO R. R. COMPANY ET AL.,
Defendants in Error.

MOTION TO DISMISS OR AFFIRM.

Come now the defendants in error by their counsel appearing in their behalf, and move the Court to dismiss the appeal in the above entitled cause, for want of jurisdiction in the Court; because,

The judgment and decree from which the said writ of error purports to have been prosecuted is a judgment and decree of the Court of Appeals of one of the United States, to wit, the Court of Appeals of the State of Kentucky, and said judgment and decree is not founded or based upon a Federal question, and does not involve the constitutional provision requiring "due process of law," or any Federal question.

Said judgment of the Court of Appeals of Kentucky involves a question of State procedure, which has been decided by the State Court according to its settled practice, and after a form

supplying notice and hearing, and does not, in any aspect, present a Constitutional or Federal question.

Said judgment of the Court of Appeals of Kentucky is based upon the findings of facts, as follows:

That the plaintiff in error in the protection of an interest which it had in the litigation defended the action of Schmidt, Trustee, v. The Louisville, Cincinnati & Lexington Railway Company, by filing the pleadings in the case, by adducing and cross-examining all the witnesses in behalf of the defense to the action, by prosecuting the several appeals in the case to the Kentucky Court of Appeals. On these conclusions of fact the State court held, under and by virtue of the general principles of estoppel and policy, that the plaintiff in error was bound by the judgment rendered in the action of Schmidt, Trustee, v. The Louisville, Cincinnati & Lexington Railway. This decision of the State court did not involve the constitutional guarantee of "due process of law" or any Federal question.

Said judgment of the Court of Appeals of Kentucky was further based upon the finding of the State court that the proceeding in which it was rendered was a proceeding *in rem*, and that the plaintiff in error, having full notice of the action, was bound by the judgment affecting the *res* in controversy. Said decision is not in conflict with the Constitution of the United States and does not involve a Federal question.

Plaintiff in error in the State court did not attempt to raise a Federal question until long after the decision of the State court of which it complains, to wit, March 21, 1898, the decision having been rendered April 4, 1896, and a Federal question, if any arose, was suggested too late and was waived.

Defendants in error by counsel, as aforesaid, also move the Court to affirm the said judgment to which said writ of error purports to have been prosecuted, because,

Although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the said question upon which the said writ of error is based is so frivolous

as not to need further argument; said question having been decided by the State Court in conformity with the rulings of this Court and the repeated decisions of the Courts of last resort of almost every State of the Union.

Accordingly it is manifest that the writ of error was taken for delay only.

JOHN G. SIMRALL,
EDMUND F. TRABUE,
Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 656.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

VERSUS

A. L. SCHMIDT, IN HIS OWN BEHALF AND AS TRUSTEE OF THE BONDHOLDERS OF THE NORTHERN DIVISION OF THE CUMBERLAND & OHIO R. R. COMPANY ET AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR, ON MOTION TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE.

This case is before the court on motion under Rule 6, to dismiss for want of jurisdiction, or affirm. The claim of jurisdiction is based upon the contention that the judgment of the Circuit Court affirmed by the Court of Appeals of Kentucky, deprives plaintiff in error of its property without due process of law. (Rec. 323.)

The judgment assailed was entered April 2, 1898, and required said plaintiff to pay into Court $77,784.45; and was affirmed by the Court of Appeals as a "delay case," October 28, 1898. (Rec. pp. 308 and 317.)

This judgment represented the net earnings of the Louisville, Cincinnatti & Lexington Division of the railway system of plaintiff in error, made on the traffic supplied to it by the North-

ern Division of the Cumberland & Ohio Railroad (hereinafter called C. & O.). The earnings were, by said judgment, subjected to a lien created thereon by a mortgage executed July 2, 1879, by the Louisville, Cincinnati & Lexington Railway Company, former owner of said division of said railway system (Rec. 14); and this suit was instituted October 12, 1885, by the trustee in said mortgage to enforce a lien on said earnings.

The facts are stated so accurately by the Court of Appeals of Kentucky in their first opinion in this case (95 Kentucky, page 291), made part of this record by agreement, that we copy therefrom:

"In 1879 the Northern Division of the Cumberland & Ohio Railroad Company leased to the appellee, the Louisville, Cincinnati & Lexington Railway Company, for the term of thirty years, its unfinished road-bed, rights of way, with improvements and appurtenances, depots and depot grounds, machinery, tools, and implements, together with all its property, rights, and franchises, belonging to or in any way appertaining to its line of railway at the town of Eminence, Ky., thence running southwardly through the counties of Henry, Shelby, and Spencer, and terminating in the county of Nelson.

"In this lease, the first-named company agreed to mortgage to the appellee all its property, rights, and franchises belonging to or in any way appertaining to its line of railway as described above, to secure the payment of three hundred and fifty bonds of one thousand dollars each, with coupons attached, to run for a term of years. The number of these bonds was subsequently reduced to two hundred and fifty. These bonds were to be put in the hands of the appellee to be sold, and the proceeds applied to the construction of the Cumberland & Ohio Railroad, and if there were any deficiency to complete the road from Shelbyville to Bloomfield, the appellee was to supply it and have a second lien therefor on the road. After such construction, the appellee was to operate the road under the lease for thirty years, and apply the net earnings derived therefrom to the payment of interest on the bonds indicated, and to the creation of a sinking fund for their retirement. To this end, the lessee was to make to the lessor quarterly returns, giving full details of earnings and operating expenses, including the expense of keeping the road-bed in order. Out of the gross earnings was first to be deducted annually the sum of one thousand dollars to be paid to the lessor

with which to keep up its organization; and, if the net earnings did not prove sufficient to pay the interest and provide for the sinking fund on the mortgage bonds, then the lessee (appellee)—if other sources of raising money failed the lessor—was to supply the deficiency as far as might be done by appropriating the net earnings, or so much as might be needed on its own lines, which might accrue by reason of business coming to it from or over the lessor's lines. The construction of the road from Shelbyville to Eminence was abandoned because the appellee had obtained a long lease of the Shelby Branch Road, which connected with its own lines at Anchorage, thus connecting the contemplated road of the lessor with its own road, and making it a "feeder" therefor. The sale of these bonds depended on the plan adopted for the prompt payment of the interest, and in order that this might be met promptly, the appellee agreed to pay it during the construction of the road, and then, as we have seen, see to its payment out of the earnings indicated. The appellee at the start contemplated giving an absolute guaranty of the payment of this interest, but upon the advice of its attorney that it had no power to do so, it executed the following mortgage on the earnings pledged in the lease heretofore described:

"'That, whereas, by authority of an act of the General Assembly of the Commonwealth of Kentucky, approved the 18th day of March, 1878, the party of the first part has entered into a contract with the Northern Division of the Cumberland & Ohio Railroad Company for the lease, construction, and operation of the latter company's line of road from Eminence, in Henry County, Ky., through a part of said county, and the counties of Shelby and Spencer, and into Nelson County, so far as Bloomfield, all in the State of Kentucky; said lease to continue for thirty years upon the terms therein set out, in which it is stipulated by and on behalf of said first party herein, that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of three hundred and fifty bonds of one thousand dollars each, bearing interest at the rate of seven per cent per annum, payable half yearly on the first days of June and December, and having twenty years to run from the second day of July, 1879, to be issued by said Northern Division of the Cumberland & Ohio Railroad Company; and if all the sources of raising money of said Northern Division of the Cumberland & Ohio Railroad fail to provide for said interest and sinking fund, then said first party herein should supply the deficiency so far as the same may be done by appropriating the net earnings, or so much thereof as may be needed on its own lines, which may accrue to it by reason of business coming to it

from or over the said lines of the said Cumberland & Ohio Railroad Company, and whereas said contract of lease has been fully consummated by action of the stockholders of the first party herein, and it is now desired to carry into effect the said stipulation as to said net earnings.

"'Now, in consideration of one dollar cash in hand paid by said second party to said first party, and the premises, the said first party has this day and does hereby mortgage and put in lien all net earnings which may accrue to it by reason of business coming to it from or over said lines of the Northern Division of the Cumberland & Ohio Railroad Company to the said Joshua F. Speed as trustee aforesaid (who is the trustee for the mortgage made by said Northern Division of the Cumberland & Ohio Railroad Company to secure said three hundred and fifty bonds, of one thousand dollars each), conditioned that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of said mortgage bonds, then said first party, if all other sources of raising money of said Northern Division of the Cumberland & Ohio Railroad Company prove insufficient, will supply the deficiency so far as it may be done by appropriating and paying over promptly the net earnings, or so much thereof as may be needed on its own lines, which may accrue by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio Railroad Company's lines for the purpose of discharging said interest and sinking fund as they severally fall due.'

"In pursuance of the contract of the lease and mortgages, these bonds were placed on the market by the appellee and sold at about their face value. No interest having been paid on them since 1883, the appellant, Schmidt, as successor to the trustee named in the mortgage, and the other appellants who were purchasers of the bonds, instituted this action to compel the appellee to account for the net earnings alleged to have accrued to it by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio Railroad Company's lines for the purpose of paying the defaulted interest and establishing the promised sinking fund with which to retire the principal at maturity. The appellee denied that it has made any profit from the business coming to it from or over the lines of the leased road.

"The case was elaborately prepared, and after a number of references to, and reports from, special commissioners—experts in the tabulation of figures—and the accumulation of several thousand pages of record, the chancellor finally dismissed the petition."

The principal point in that appeal was the second question as stated by the Court, page 297 (95 Ky. 297):

"The second question is how are we to ascertain the net earnings in lien under the mortgage?"

The judgment of the court below dismissing our petition was reversed by the Court of Appeals, which ordered the confirmation of the report, R. E. S. No. 2 in this Record, page 65, showing net earnings of $60,192.27 to which the Cumberland & Ohio bondholders were entitled under said mortgage up to 1890, the date of that report.

That report was the basis of the judgment herein from which the last appeal was taken.

Upon the confirmation of that report in the lower court, a rule was taken upon the Louisville, Cincinnati & Lexington Railway to pay those earnings into Court, as covered by the mortgage (Record, page 214), and a further rule to report the net earnings accrued since the last report was made.

To the first rule the Louisville, Cincinnati & Lexington Railway made the following response (Record, page 215):

"The Louisville, Cincinnati & Lexington Railway Company, for response to the rule herein issued against it to show cause why it shall not pay into court the amount of $53,565.62, says that in 1881 it sold and conveyed, for a consideration paid at the time, all its property, rights, privileges, and franchises, except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets, or funds of any kind with which to comply with the order of this Court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it.

"HELM & BRUCE,
"Attorneys for Defendant.

"The affiant, J. H. Ellis, states that he is the secretary of the defendant, The Louisville, Cincinnati & Lexington Railway Company, and is the chief officer of said Company now in the

State of Kentucky, and that he believes the statements of the foregoing response to be true.

"J. H. ELLIS.

"Subscribed and sworn to by J. H. Ellis, June 11, 1894.

"THOS. B. HARRISON,

"Notary."

To the second rule the said Louisville, Cincinnati & Lexington Railway made this response (Record, page 217):

"The defendant, the Louisville, Cincinnati & Lexington Railway Company, responds to the rule against it to show cause, if any it has or can, why it should not be compelled to report herein the amount of its net earnings on business coming to it from or over the Cumberland & Ohio road since the time of the last net earnings reported in said report, R. E. S. No. 2, together with the interest thereon from the time said earnings should have been applied, under the contract, in payment of the interest on the bonds—states and shows to this Court that it has not made any net earnings or earnings of any kind since the date aforesaid, on business coming to it from or over the Cumberland & Ohio road, nor has it made earnings of any kind, since it does not own any railroad or property of any character whatever, and has not since the date aforesaid.

"HELM & BRUCE,

"Attorneys for Defendant.

"M. H. Smith says he is the president of the defendant, and that he believes the statements contained in the foregoing response are true.

"M. H. SMITH.

"Subscribed and sworn to before me by M. H. Smith this 28th day of June, 1894.

"THOS. B. HARRISON, JR.,

"Notary Public, Jefferson Co., Ky.

"My Commission expires July 10, 1896."

Milton Smith, the President of the L. C. & L. Railway, and also of the Louisville & Nashville Railroad, had given his deposition in this action in 1891 (Record, page 184), and had testified that the Louisville & Nashville Railroad Co. owned the stock of the Louisville, Cincinnati & Lexington Railway Co.

On page 189 he says:

"*Q.* Does the Louisville & Nashville Railroad own any of the bonds executed by the C. & O. Northern Division?

"*A.* The Louisville & Nashville Railroad Co. as the owner of the stock of the L. C. & L Railway Co. and thereby responsible for the payment of the bond obligations of the Company is the owner of fifty bonds of the C. & O. Northern Division, said bonds having been placed in the sinking fund under the mortgages."

These responses made such disclosures as led to the truth that the Louisville & Nashville Railroad Co. had taken an assignment of the lease of the Cumberland & Ohio road and had bought bodily the Louisville, Cincinnati & Lexington Railway, and had been operating both roads and been receiving all the earnings pledged to these C. & O. bondholders both under the lease and mortgage during the entire time of this litigation, then ten years, and now about fourteen years.

It thus developed that the *Louisville & Nashville Railroad Co.* had been the *real defendant* to this suit all the time; for these responses disclose the fact that the *nominal defendant* had no railroad, had operated none, had received no earnings, had no assets; did not have a nickel with which to defray the expense of this litigation; in fact, had no interest in it; but had sold out "lock, stock, and barrel" to the Louisville & Nashville Railroad Co. before this suit was brought.

The summons in this action was served upon Milton Smith, the President of both railroad companies (see pages 14 and 184).

As said by the Court of Appeals of Kentucky in the Heckman case, 85 Ky. 631, where the Louisville & Nashville Railroad offered the same contentions as here, it was the duty of the defendant, if it was acting in good faith with the Court, to have disclosed these facts at the threshold.

But such was not the intention. The Louisville and Nashville Railroad Co. was operating both roads, and receiving day by day all the earnings pledged to these bondholders, which are

the subject-matter of this litigation; and its intention was as shown by the Record to defend this suit—with all its wealth and power, in the name of a nominal defendant; until it had worn out the bondholders with litigation, and then if a judgment should be rendered, to plead that it had never been a party to the suit and had never had a day in Court.

And this is precisely what the Louisville & Nashville Railroad Co. has done. After a long and costly litigation resulting in a final judgment, it asks to be permitted to take advantage of its own wrong and to fight it all over again in its own name.

And when we say "*fight it over*," we mean "*fight it over.*" For there has already beed a *battle royal* all along the line in this action, for fourteen years. This Record shows that the Louisville Law and Equity Court decided so many times in favor of the Louisville & Nashville Railroad Co. that we were compelled to go to the Court of Appeals of Kentucky five times to secure the rights of these bondholders.

And still the L. & N. is not content; but comes to the Supreme Court of the United States—after having exhausted in the State Court all the means known and unknown to the law to defeat an honest debt—with the pitiful plea, that it has not yet had *a day in Court.* With it *one day* must be as a *thousand years.*

The Record before this Court is but a fragment of the enormous Record made by this stubborn litigation.

In the first opinion of the Court of Appeals, 95 Ky., page 295, that Court says:

"The case was elaborately prepared, and after a number of references to and reports from special Commissioners—experts in the tabulation of figures—and the accumulation of *several thousand pages of Record*, the chancellor finally dismissed the petition."

On pages 317, 318, and 319 of the Record is an agreement of counsel, showing parts of Record omitted. On page 319 is statement of contents of one report alone of 5,000 pages. It says:

"The report of Calvert covers about 5,000 pages and occupied about ten months in making same, with the aid of another deputy, for which he charged $4,000.00.

"Calvert was selected as Special Commissioner as a railroad expert. His report was a statement of the gross earnings derived by the defendant in the action on business coming to it from or over the Northern Division of the Cumberland & Ohio Railroad under the lease, contract, and mortgage between the said parties, and of the expense incurred in handling the business, with various theories and statement showing what proportion of the expense of the whole *Louisville & Nashville Railroad System* should be deducted from its gross earnings to which the plaintiffs, the Cumberland & Ohio bondholders, were entitled under their mortgage and lease."

In this Record, pages 60 to 171 inclusive, there are *ten different reports*, making about 111 pages of figures compiled by R. E. Sewell as Special Commissioner, but at the same time he was the *Auditor of the Louisville & Nashville Railroad Co.*

He says on page 76:

"The affiant, R. E. Sewell, says that as the *Auditor* of the *Louisville & Nashville Railroad Company* he superintended all work of a similar kind of the Louisville, Cincinnati & Lexington Railway Co., defendant herein; and all like statements rendered herein heretofore by said defendant, have been made *under his superintendence.*"

The Court will see what an enormous labor this was, performed in this action by one of the chief officers of the *Louisville & Nashville Railroad Co.* and without a cent of charge therefor. In making these reports the defendant took the depositions of three other principal officers of the Louisville & Nashville Railroad Co., viz.: Charles Haydon, Assistant Comptroller; Edward Rowland, Auditor of Receipts, and Milton Smith, President.

On page 174 Haydon testified as follows:

"Charles Haydon being duly sworn and examined by Mr. Helm as attorney for the defendant, deposed as follows:

"1. Will you please state your name, age, residence, and occupation?

"*A.* Charles Haydon, 53 years old, reside in this city, Assistant Comptroller of the L. & N. Railroad.

"2. I show you now an account kept between the Northern Division of the Cumberland & Ohio Road and *the Louisville & Nashville Railroad, running back,* however, to a period when the account was kept between the old Louisville, Cincinnati & Lexington Railroad and the Northern Division of the Cumberland & Ohio, and ask you whether this report was taken from the Records of the *Louisville & Nashville Railroad* office under your supervision, and whether you know it to be correct?

"*A.* Yes, sir; this account was made out in my office and was taken from the books.

"3. Is it a correct transcript?

"*A.* Yes, sir; it is an accurate transcript from the Book."

Edward Rowland (page 174) testifies that he was the "Auditor of Receipts of the Louisville & Nashville Railroad:"

14. "Were the statements showing the number of tons of freight carried over the L. C. & L. Railway and the Shelby Railroad, and the number of tons of freight carried one mile over said Roads, and the Revenue on said freight accruing from said Roads, all of which freight came from or went to the Northern Division of the Cumberland & Ohio Road, compiled in your office and under your supervision?

A. "Yes, sir."

Then comes the deposition of Mr. Milton Smith, page 184. In answer to the first question he says he is the President of the Louisville & Nashville Railroad Co.

His entire deposition is then an elaborate review of the Report R. E. S. No. 2, made by his own Auditor Sewell—which is the basis of the judgment in this action.

On page 186 this question is asked him:

Q. "Have you examined Special Commissioner R. E. Sewell's Report, especially that phase of it known as No. 2? If so, please state whether in your opinion it proceeds upon a correct principle, and whether or not it is correct in details? Answer this question fully."

He then proceeds at great length to show wherein this Report of his own Auditor is erroneous. And on page 189 he says:

"*A.* The contracts between the L. C. & L. Railway and the C. & O. Northern Division have resulted in very great losses to the *Louisville & Nashville Railroad Co.* The gross earnings of the C. & O. Northern Division have never been sufficient to pay operating expenses. On the contrary, the deficit has been very large. The total loss growing out of the contracts between the L. C. & L. Railway and the C. & O. Northern Division up to June 30, 1890, amounts to $522,103.38, not including loss upon depreciation in the value of the fifty Bonds owned, resulting from the failure of the property to earn an amount in excess of the operating expenses sufficient to pay the interest upon the said bonds. The operating expenses to June 30, 1890, were $309,027.27, and the gross earnings $185,407.49; operating expenses in excess of gross earnings, $123,619.88."

Now the curious thing is to explain this deposition in connection with the two responses filed by the defendant herein on pages 215 and 217.

One of these responses is sworn to by Milton Smith, the President of both the L. C. & L. and the L. & N. Railroads; and both responses show that the L. C. & L., the nominal defendant, has never operated any railroad during all this time, and has never received one cent of earnings.

What, then, does this deposition of Milton Smith relate to?

Of course, the earnings received by the *Louisville & Nashville Railroad Co.* on what was known as the L. C. & L. Railway Co. on its own lines on business coming to it from or over the Cumberland & Ohio Railroad (Northern Division).

During this entire deposition the Court will find that Milton Smith, the President of both the L. C. & L. and the L. & N. Railroads speaks of both of them as one and the same, so far as these transactions are concerned.

Then, again, this litigation had been conducted entirely by Barnett, Miller & Barnett as attorneys for the defendant for six years up to the 20th of April, 1891, when, for some reason, which the record does not disclose, they retired from the cause and Helm & Bruce were substituted in their stead. When they retired, they did so as *the attorneys of the Louisville & Nashville*

Railroad Co., showing that up to that time the action had been defended by the *Louisville & Nashville Railroad Co.* This is shown by the following extract from the Record (pages 79 and 80):

"At a Court held for the Court aforesaid on the 20th day of April, 1891, came Barnett, Miller & Barnett, and filed a written notice in this action duly accepted. And on their motion their names are stricken from the Record herein *as attorneys for Louisville & Nashville Railroad Co.*

"Said notice is in words and figures as follows, to wit:

LOUISVILLE LAW AND EQUITY COURT.

SCHMIDT, - - - - - - - - - *Plaintiff*,
VERSUS No. 1860.
L. C. & L. R'Y CO., - - - - - *Defendant*. } Notice.

"*The Louisville & Nashville Railroad Company* will take notice that on Monday, April 20th, 1891, at the motion hour we will move the Court to strike our names from the record herein as attorneys for said Railroad Company.

"BARNETT, MILLER & BARNETT."

"Notice accepted."

HELM & BRUCE, *Att'ys for Def't.*"

(See Order, page 79.)

It was within sixty days from the disappearance in this case of Barnett, Miller & Barnett as *the attorneys of the Louisville & Nashville Railroad Company*—never pretending to represent anybody else—when Messrs. Helm & Bruce, having taken their place, commence the taking of proof; and prove beyond the shadow of a doubt on page 174, by the deposition of Haydon, Assistant Comptroller of the L. & N., that the entire controversy in this case is with the *Louisville & Nashville Railroad Co.*

In fact, Mr. Helm, the attorney for the L. & N., in the second question he puts to the witness, assumes that the controversy is with the *Louisville & Nashville Railroad Co.* (P. 174.)

When these responses were filed showing that the nominal defendant, the L. C. & L. Railway, had no railroad, had operated

none, and had received no earnings, and had no interest in this litigation and no money to defray the expense thereof; this record then became luminous with the overwhelming proof that the *Louisville & Nashville Railroad Company* had been the *real defendant* all the time.

We then tendered an amended petition (page 224 of the Record), setting up the facts hereinbefore stated, and making the Louisville & Nashville Railroad nominally a party, and showing that the L. C. & L. had no railroad, property, or means to conduct a defense, and that the Louisville & Nashville Railroad Co., by its officers and agents, took charge of the defense of this case, controlled it, employed counsel, produced evidence, and paid the expenses of the nominal defendant, and made the entire defense.

We then made the following additional allegations, in substance, as set out in the opinion of the Court of Appeals of Kentucky (99 Kentucky, 147–149–150–155, Appendix to brief of associate counsel):

"It further alleges that in November, 1881, after the execution of the lease and mortgage, and with actual notice and knowledge of the provisions thereof, the Louisville & Nashville Railroad Co. bought the property, road, and franchise to operate same of the Louisville, Cincinnati & Lexington Railway Co., and received a deed therefor, which was duly recorded; that by that deed the lease of the Cumberland & Ohio was assigned and transferred to the Louisville & Nashville Railroad Co., and the latter company accepted the transfer and assumed the obligations thereof; that having theretofore purchased the capital stock of the Louisville, Cincinnati & Lexington Railway Co., the Louisville & Nashville Railroad Co. took and kept the whole purchase price of the road, and has since had possession of the roads of both the Cumberland & Ohio and Louisville, Cincinnati & Lexington companies; has operated them and taken the earnings; has made the earnings shown in this case and ascertained in the judgments, which were described therein as the earnings of the Louisville, Cincinnati & Lexington Railway Co.; that the Louisville & Nashville Co. not only knew the provisions of the lease and mortgage, but actually applied net earnings of the Louisville, Cincinnati & Lexington road in accordance therewith until

April, 1883, and knew that the earnings referred to were made on the operations of the roads of the Cumberland & Ohio and Louisville, Cincinnati & Lexington companies; that the Louisville & Nashville Co. filed an answer herein in the name of Louisville, Cincinnati & Lexington Co., employed counsel to make defense, and has controlled the defense in this case from the time of service of process. . . .

"Upon the first question there is little difficulty. Assuming the statements of the amended petition to be true (and for the purposes of this appeal we must so presume), together with the facts disclosed by the record, it appears that the Louisville, Cincinnati & Lexington Co. had no railroad, property, or means to conduct a defense; that it had only the franchise to exist, and that the Louisville & Nashville Railroad Co., by its officers and agents, took charge of the defense of this case, controlled it, employed counsel, produced evidence, and paid the expenses of the nominal defendant in the suit. . . .

"In our opinion the law is well settled that if the statements of the amendment tendered are true the Louisville & Nashville Railroad Co. is bound by the judgment against the Louisville, Cincinnati & Lexington Railway Co., and in any litigation between the Louisville & Nashville Co. and the plaintiffs in this suit the record of this suit might be introduced, with evidence showing the truth of the averments of the amended petition. . . .

"In our view the facts stated in the amended petition did not give the appellants the right to file a petition making the Louisville & Nashville Railroad Co. a party defendant to this litigation, for upon the theory of that amendment, and considering the facts therein stated to be true, that company was already a party defendant and bound by the judgment. The proper procedure, therefore, would have been either to institute a separate suit against the Louisville & Nashville Railroad Co. setting up the record in this suit and the facts connecting that company with this litigation, or to proceed against the Louisville & Nashville Railroad Co. in this suit by rule based upon an affidavit, stating the facts set out in the amendment."

The lower court refused to allow this amendment to be filed, on the ground that there was no privity between the Lonisville & Nashville Railroad and the other parties to this contract, and that our mortgage on earnings only applied to such as were made by the L. C. & L. Railway Co., and that when the L. C. & L. sold out to the L. & N. our lien was gone.

The Court of Appeals (99 Ky. 143) affirmed the judgment so far as it did not allow the amendment to be filed, but put it upon the ground that it was not necessary to bring the Louisville & Nashville Road before the court by an amendment—that if the facts set up in the amended pleading tendered were true, the Louisville & Nashville Railroad had been the real defendant all the time.

Upon the return of the case to the Lower Court in pursuance of that opinion, we filed the affidavit of plaintiff, A. L. Schmidt, Trustee, setting up substantially the foregoing facts as contained in the Amended Petition (page 262 of Record), and asked a rule against the Louisville & Nashville Railroad Co. to pay into Court the net earnings covered by the mortgage and lease as found in the Report R. E. S. No. 2, which had been confirmed.

The Lower Court still refused to grant the rule. We then appealed again to the Court of Appeals, which reversed the Lower Court again (44 S. W. Rep. 130), and gave the Louisville & Nashville Railroad Co. an opportunity to show in response to the rule whether or not it had been the real defendant herein. Upon this mandate the Lower Court finally granted the rule, and the Louisville & Nashville Railroad responded.

On the hearing, the foregoing affidavit and the entire record were read. The response was adjudged insufficient; the rule made absolute. Another appeal taken; the judgment affirmed by the Court of Appeals. (47 S. W. Rep. 583; 20 Ky. L. Rep. 810.)

Then the writ of error; and the case is brought to this Court.

The response made by the Louisville & Nashville Railroad (page 293) wholly fails to deny that it was the *real defendant* to this suit.

It does not deny that it filed an answer herein in the name of the Louisville, Cincinnati & Lexington Railway Co. It does not deny that through its attorneys and President and other officers it has taken the depositions, kept the accounts, and made the reports herein and managed the entire defense herein from the date of the service of process.

It in effect admits all these things and the further fact, that it has been operating the road all this time and received all the earnings which are the subject matter of this litigation, and now has them in possession.

The response to the rule makes two defenses:

First, the technical defense that the L. & N. was not nominally a party to the suit, and, for the first time, sought to raise a Federal question.

Second, a defense to the merits, to wit: That the contract sued on was made with the L. C. & L. Railway, and that the lease was assigned to the Louisville & Nashville Railroad in violation of the lessor's charter.

But this last-named question had been fully settled in another suit between these same parties, including the L. & N. in a suit in the Shelby Circuit, which has been going on for years concurrently with this. (41 S. W. Rep. 1015.)

When the Louisville & Nashville Road found out that in this action the courts would compel it to comply with this contract made with the L. C. & L. Railway, it gave notice that it would abandon the Cumberland & Ohio Road and cease to operate it under that lease.

A. L. Schmidt, Trustee for the Cumberland & Ohio Bondholders, then filed a Bill in Equity in the Shelby Circuit Court for a mandatory injunction against the Louisville & Nashville Railroad Co., compelling it to continue to operate said C. & O. Road under said lease; which was granted on final hearing in the Court of Appeals of Kentucky.

The opinion of the Court of Appeals in that case considers thoroughly the rights and obligations of the Louisville & Nashville Railroad Co. under these contracts, and holds that the lease and mortgages are to be considered as one contract, and that, by reason of the facts—that the Louisville & Nashville Railroad Co. had bought one of these roads and taken an assignment of the lease on the other, and had gone into possession and was operating both of them—the Louisville & Nashville Railroad Co.

had thereby stepped into the shoes of the Louisville, Cincinnati & Lexington Railway Co., and had assumed its obligations, and was bound by both the mortgage and the lease. See opinion of Court of Appeals, 19th Law Reporter, page 666; 41 S. W. Rep. 1015.

By order on pages 296 and 297, the said opinion and affidavits showing these facts were also read on the hearing of this response of the L. & N., which was adjudged insufficient.

This would seem to be *res adjudicata* as to the L. & N. on a defense to the merits made by the L. & N. in its own name, in this case.

We have endeavored to state the facts of this case concisely, but fully, so as to enable the Court, without further examination of the record, to promptly dispose of our motions, which are:

First: To dismiss this writ of error for want of jurisdiction.

Second: To affirm as a delay case.

ARGUMENT.

The Question of Procedure.

For nearly four years the question was litigated in the State Courts as to whether or not the Louisville & Nashville Railroad Company was before the Court as the real defendant; and after being before the Court of Appeals of Kentucky on that question alone three times, it was finally conclusively settled that the *Louisville & Nashville Railroad Co.* was the real defendant and concluded by the judgment.

The Court of Appeals of Kentucky, in deciding this question, says (Ky. Law Rep. 19, page 1626; 44 S. W. Rep. 30, Appendix to brief of associate counsel):

"In our judgment the question presented by this appeal is one of procedure. This suit is essentially a proceeding *in rem* to subject to appellants' claim the net profits made on business coming to the line of the Louisville, Cincinnati & Lexington Ry. Co. from and over the Cumberland & Ohio. If the aver-

ments of the affidavit are true, then the Louisville & Nashville R. R. Co. operated the Cumberland & Ohio, as well as the Louisville, Cincinnati & Lexington Ry., by virtue of the sale to it of the latter's property and the assignment of the lease and contract, which it undertook to perform; received the net profits referred to; defended this suit in the name of the Louisville, Cincinnati & Lexington Ry. Co.; and was a real defendant in this action. Assuming these averments to be true, the sole question is whether the appellants are required to bring a separate and additional suit against the Louisville & Nashville R. R. Co., making these averments and setting up the record in this case, or whether in this same suit the question may be determined upon response to rule whether or not the Louisville & Nashville R. R. Co. was a real defendant in this action.

"After a careful consideration of the question, it seems to us that the question whether the Louisville & Nashville Railroad Company has had its day in court in this suit can be as well determined in this suit as in another. If the Louisville & Nashville Railroad Company is a party to this suit it is because it has, as assignee of the contract and owner of the property of the Louisville, Cincinnati & Lexington Railway Company, obtained the net earnings and conducted the defense of this suit, and the truth of these averments can be ascertained upon rule and response, and the payment of the earnings received be compelled as the production of mortgaged property might be compelled in ordinary proceedings to enforce liens."

On the return of the case to the lower court the Trustee for the bondholders filed his affidavit (Rec., p. 262) and secured a rule against the L. & N. to pay into Court the fund theretofore adjudged as belonging to said bondholders. To this rule the L. & N. filed a response, which was held insufficient. The procedure was regular and not reviewable.

The case of Iowa Central Railway Co. v. Iowa, decided at October term, 1895 (160 U. S., page 392), was an application for a mandamus to compel the Railroad Company to operate a leased road.

This Court, in an opinion by Mr. Justice White (160 U. S., page 392), said:

"It is apparent that this defense merely asserted that the rights of the corporation as a citizen of the United States would

be impaired by enforcing the claim urged against it on the motion, instead of by another and less summary form of action. But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the State Court prosecuted or determined by one form of action instead of another. It is also equally evident, provided the form sanctioned by the State law gives notice and affords an opportunity to be heard, that the mere question of whether it was by motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words."

The Court dismissed the writ of error for want of jurisdiction.

The opinion of this Court in the foregoing case seems to decide so clearly that the question raised here is one of procedure, and conclusively settled by the State Court, and that the Federal Courts have no jurisdiction to review it, that we hardly feel justified in further argument.

The Kentucky Court of Appeals decided that the question of whether the Louisville & Nashville Railroad had been the real party defendant to the suit of Schmidt, Trustee, v. Louisville, Cincinnati & Lexington Railway might be and was determined by proceeding by rule and response. Such a course gave the L. & N. reasonable notice of the objects sought to be attained and afforded fair opportunity for the L. & N. to be heard on any issue which its position permitted it to raise.

These facts appearing from a reading of the record and the opinion of the State Appellate Court, the utterance of this Court in Iowa Central R. Co. v. Iowa, *supra*, would place a review of the question of procedure beyond the province of this submission.

The Merits of the Submission.

The regularity of the proceedings by which the Louisville & Nashville Railroad was held bound by the judgment rendered

against the Louisville, Cincinnati & Lexington being placed beyond the scope of this review, we come now to consider the merit of the writ. As will be seen from a perusal of the affidavit filed in support of the rule and the response thereto, and the opinion of the Kentucky Court of Appeals, this case was decided by the State Court on the two grounds:

First. This was a proceeding *in rem*, and the Louisville & Nashville, having notice of the proceedings, was bound by the judgment affecting the *res* (19 Ky. Law Rep. 1626).

Second. The Louisville & Nashville, having an interest in the litigation, having received the net earnings referred to in the pleadings and proof, having defended the suit in the name of the Louisville, Cincinnati & Lexington, was the real defendant in the action, and was bound by the judgment (19 Ky. Law Rep. 1626).

We now submit:

(1) That both phases of the case are sustained by the facts of the record, and are amply sufficient in law to support the findings of the State Court, and therefore there can be no lack of "due process of law."

(2) That it is without the jurisdiction of this court to review the questions presented, as the two basic propositions of law announced by the Kentucky Court of Appeals are of that general nature upon which the State Court is at liberty to decide as seems to it right and proper.

We observe this order of discussion because a consideration of the first contention will place the court in possession of facts and authorities calculated to illumine and support the second chapter of our argument. This program perhaps reverses the natural order of things, but we deem it best adapted to an intelligent review of the case.

This Action Was a Proceeding in Rem.

Under the lease and mortgage between the Louisville, Cincinnati & Lexington Railway (hereinafter called the L. C. &

L.) and the bondholders of the Northern Division of the Cumberland & Ohio Railroad (hereinafter termed C. & O.), the latter had a lien on all the net earnings coming to the L. C. & L. from and over the C. & O. Before these earnings accrued, to wit, in 1881, the L. C. & C. conveyed the lease and mortgage to the L. & N., who thereby assumed the obligations of these deeds, and became bound for their performance. In 1885 net earnings of the L. C. & L. coming to it from and over the C. & O. came into existence, and not being appropriated as required by the terms of the instruments above mentioned, the bondholders of the C. & O. instituted suit for the purpose of enforcing their mortgage upon such earnings. There was nothing more asked or contemplated by the suit than an enforcement of a lien upon property. No personal judgment was sought; no relief prayed, save an adjudication as to the ownership of these earnings. The petition recites the various contracts and agreements existing between the L. C. & L. and the bondholders of the C. & O., the existence of earnings properly belonging to the bondholders, and concludes with the following prayer: (Record, page 13.)

"Wherefore the plaintiffs pray that this action be referred to the commissioner of this Court, with directions to take proof concerning and report the net earnings aforesaid of the Northern Division of the Cumberland & Ohio Railroad Company, and on the lines of the Louisville, Cincinnati & Lexington Railway Company, which may be liable and subjected by the order herein to pay the accrued interest and coupons attached to said bonds; that said Louisville, Cincinnati & Lexington Railway Company be required by order herein to pay all such earnings into court, and that the same be applied to the payment of said interest and coupons, for plaintiffs' cost, etc."

The answer filed in the name of the L. C. & L. is simply a denial that the earnings mentioned in the petition had ever accrued; a mere traverse of the allegation concerning the existence of the property sought to be recovered by the petition.

The rule against the L. & N. does not ask a personal decree

against the L. & N., but seeks only to have the L. & N. bring into Court the fund or property theretofore decreed as belonging to the bondholders of the C. & O.

The judgment against the L. & N. was drafted in conformity with the idea that nothing save the recovery of specific property was involved in the litigation. The judgment provides (Record, page 308):

"And it is adjudged and ordered that the said response to the said rule is insufficient, and that the said rule is made absolute, and the said Louisville & Nashville Railroad Co. is ordered to pay into court the amount of judgment herein, the said sum of $90,053.34, as of March 21, 1898, subject, however, to the following credits."

The following facts are equally prominent upon the record:

That the Court had jurisdiction of the parties to and subject-matter of the suit.

That this was an action brought for the single purpose of enforcing a lien upon property.

That the property affected by the suit was within the jurisdiction of the Court, both the L. & N. and the L. C. & L. being Kentucky corporations, with their personal property located in Kentucky.

That the L. C. & L. and the L. & N. had notice of the institution and pendency of the suit, as well as its nature and objects; the L. C. & L. by actual service of summons, the L. & N. by direct participation in the action.

That the *res* only was impleaded, and the earnings were the real party defendant to the suit; the bondholders of the C. & O., the L. & N., and the L. C. & L. all appearing as claimants of the property.

We submit that these facts combining, a proceeding *in rem*, or, as some authorities put it, a proceeding in the nature of a proceeding *in rem*, resulted. In support of this position we quote the following from Works on Courts and their Jurisdiction. Section 14 relates to jurisdiction *in rem*, and reads as follows:

"Jurisdiction of property is acquired by a seizure of or levy upon the same under some proper writ issuing out of the Court having jurisdiction over such property, *or arises from some contract lien existing against the property and which is sought to be enforced.* But such acquisition of jurisdiction, in order to be effectual, must be followed by a notice in some form to the party whose rights are to be cut off or affected by the decree against the property. . . . There are many cases, however, in which *no seizure of the property is necessary.* If the action is *to enforce a lien upon the property created by contract, as for example a suit to foreclose a mortgage, seizure on the property is not necessary.* The fact that the property is within the State is the essential fact upon which jurisdiction depends in that class of cases, but in such cases notice in some form is necessary to give jurisdiction."

We quote this authority as showing that an actual seizure of property is not essential to a proceeding *in rem.*

We find that Mr. Justice Field sanctions such a proposition of law in the case of Pennoyer v. Neff (95 U. S. 714), where he says:

"Property in the State is brought under the control of the Court and subject to its disposition, by process adapted to that purpose, *or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem.*"

Mr. Justice Gray, in Scott v. McNeal (154 U. S. 34), has this to say on the subject:

"Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceeding, and *who had notice either actually or by the thing condemned being first seized into the custody of the Court.*"

If this was an action *in rem*, then the L. & N. Railroad, with notice of the pendency and nature of the suit, was bound by the judgment affecting the *res*, and the provision of the Constitution relative to "due process of law" has been satisfied.

As outlined above, the question of this Court's power to disturb the decision of the State Court holding that this was a proceeding *in rem* is reserved for later discussion.

The L. & N. having in every aspect of the case defended the action in the protection of an interest which it had in the litigation, the corporation is bound by the judgment, notwithstanding the fact that it was not named of record.

This, in brief, is the decision of the Kentucky Court of Appeals. Plaintiff in error complains that such a decision contravenes the provision, "Nor shall any State deprive any person of life, liberty, or property without due process of law."

In short, plaintiff's position resolves itself into the contention that a party *must be named of record before judgment can be rendered against it.*

What are the facts of this case, presented more in detail?

The charges of the affidavit filed in support of the rule stand both confessed by the response to the rule and proven by the pleadings and the evidence of the antecedent record. From this affidavit the following facts are developed:

(1) The L & N. Railroad had succeeded to the property rights and possessions of the L. C. & L., including the lease of the C. & O. held by the L. C. & L.; and that such succession had imposed on the L. & N. all the duties and liabilities of that lease. (Rec. p. 262–270.)

(2) The L. & N. had received and reduced to its possession and use all the net earnings accruing to the L. C. & L. from and over the C. & O., which earnings had, to the last dollar, been assigned and mortgaged to the Trustees of the C. & O. bondholders. (Rec. p. 270.)

(3) The earnings so received by the L. & N. were the *res* and subject of the suit instituted in October, 1885 (and now up for review before this Court). (Rec. p. 270.)

(4) In such suit the L. & N. employed counsel to defend, not for the L. C. & L., but for itself. The L. & N. filed the pleadings in the case. The L. & N. adduced and examined all the witnesses heard in behalf of the defense to the action. The L.

& N. prosecuted the several appeals in the case to the Kentucky Court of Appeals. (Rec. p. 270.)

Under these circumstances and with these conditions boldly prominent in the case, the Kentucky Court of Appeals held that the L. & N. was the real party defendant to the action and bound to respond to the judgment decreeing that earnings had accrued and belonged to the C. & O. bondholders. Was such decision based on due process of law?

What is Due Process of Law?

Judge Cooley, in his work on Constitutional Limitations, gives this definition, page 355:

"Due process of law means such an exercise of the powers of government as the settled maxims of law permit and sanction."

Said Mr. Webster in his Dartmouth College argument:

"It is the general law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

In Davidson v. New Orleans, Mr. Justice Bradley uses this language in judging what is "due process of law":

"Respect must be had to the cause and object of the taking. . . . If found to be suitable or admissible in the special case, it will be adjudged 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

These three statements, differing so widely in their scope and purview, considered together about exhaust all the phases of "due process of law." Let us measure this case by the standards above presented.

What do the settled maxims of the law permit and sanction on the subject of the necessity of naming a party in the pleadings before holding him concluded by the judgment?

Freeman on Judgments has this to say:

"Of Persons Bound, Though Neither Parties nor Privies."

(Section 174.) "'Neither the benefit of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies.' Or, in other words, there is a numerous and important class of persons who, being neither parties upon the record nor acquirers of interests from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person.

(Section 175.) "For the purpose of showing that parties not named in the record were the real parties in interest, and conducted the suit in the name of others, who were only nominal parties, parol evidence may always be offered, and when the showing is made, the real parties are concluded by the judgment."

Black on Judgment states the law as follows:

(Section 539.) "Extrinsic evidence is admissible to prove that a real party in a suit was not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party; whenever this is made to appear, the real party is concluded by the judgment as effectually as if he had been a party to the record."

(Section 540.) "A person who is not made a defendant of record may still subject himself to be concluded by the result of the litigation if he openly and actively and in respect to some interest of his own assumes the defense of the action."

Herman on Estoppel treats the subject in this language:

(Section 156.) "It is not always essential to the creation of an estoppel that the person should be a party to the record. One who instigates and promotes litigation for his own benefit by employing counsel or binding himself for costs and damages will be bound by the litigation or procedure as much as the party to the record.

(Section 182.) "Parties in the legal sense are all persons having a right to control the proceedings, to defend, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies."

Van Fleet on Former Adjudication (Section 523) says:

"If one who has an interest in an issue involved in litigation between others openly aids in the defense, the judgment settling that issue will make it *res adjudicata* between him and the plaintiff."

Jones, in his Law of Evidence (Section 602), discusses the proposition now considered in the following statements:

"In discussing the conclusiveness of judgments upon parties and privies, Mr. Greenleaf lays down the rule that 'parties, in the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision.' Hence a judgment may be evidence against and conclusive upon the rights of one who was not a nominal party in the former proceeding, if he is the person who controlled and directed the action, but the mere fact that one has contributed to a defense does not make the judgment conclusive upon him. But generally one who defends or prosecutes by employing counsel, paying costs, and doing those things that are generally done by a party, will be bound by the judgment, though not a party."

The American and English Encyclopedia of Law, under the title of Judgments (Vol. 12, page 97), epitomizes the law as follows:

"A judgment is binding upon persons who are not parties upon the record when the action is conducted in their behalf, and they have the right to control the proceedings, examine witnesses, and appeal from the judgment. Parol evidence is admissible to show that parties not named in the record were such real parties in interest."

Again, in Volume 21, page 177, it is said:

"Parties are those who have the right to control the proceedings in an action. They may or may not be parties to the record, the interest they have in the suit and not their record status determining their relation to the suit. . . . The record party may be ignored by the court and the party really interested may be the one whose standing and position in the case will alone be considered in the disposition of the case."

The Court will find that these statements of the law as laid down in the various text-books mentioned are supported by decisions of both Federal and State Courts.

From a legion of adjudicated cases containing an announcement of the law by almost every court of the land, we quote the following as showing how universally the proposition for which we contend has been sanctioned and approved.

In the Eagle Mfg. Co. v. Bradley Mfg. Co. (50 Fed. Rep. 193), the U. S. Circuit Court for the northern district of Illinois quotes the law as follows:

"The rule laid down in Robbins v. Chicago City, 4 Wall. 657, seems to me fully applicable in this case. There the court said:

"'The conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination.'

"Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. And this same rule is restated and followed in numerous cases, among which are Beloit v. Morgan, 7 Wall. 619; Miller v. Liggett, etc., Co., 7 Fed. Rep. 91; Claflin v. Fletcher, *Id.* 851; American Bell Tel. Co. v. National Imp. Tel. Co., 27 Fed. Rep. 666; Morse v. Knapp, 37 Fed. Rep. 352; Lea v. Deakin, 11 Biss. 23, 13 Fed. Rep. 514; Wilson's Ex'r v. Deen, 121 U. S. 525, 7 Sup. Ct. Rep. 1004.

"The proof in this case shows beyond doubt that the defendant in this case, with the consent of the defendants in the Iowa case, made itself the *dominus litus* in that case; it controlled the defense; appeared by its own attorneys; it was the manufacturer of the plows in which the alleged infringement was found; and may, I think, with entire propriety, be held to be bound, not only upon all the questions which were raised and determined in the former case, but upon all which might have been raised and determined in that case."

Lovejoy v. Murray (3d Wallace, 18) was a case involving the liability of a plaintiff in an attachment suit, who had taken

upon himself the defense of an action brought against the attaching officer on the attachment bond, to answer a judgment rendered against such officer. Mr. Justice Miller, in passing upon the conclusiveness of the judgment against the officer as affecting the plaintiff in the attachment suit, who was not a party to the suit on the bond, has this to say:

"They (referring to the plaintiff in the attachment) were defending their own acts, although the suit was in the sheriff's name. They had every right to make all the defense there which they could and would make. They could adduce witnesses and cross-examine those of plaintiff, and could have taken an appeal. The case is wanting in none of the elements so happily stated by Mr. Greenleaf as rendering a former judgment conclusive in a second suit. 'Justice requires,' he says, 'that every cause be once fairly and impartially tried, but the public tranquility demands that, having been once so tried, all litigation of that question and between the same parties should be closed forever. It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he is a stranger; but the converse of this rule is equally true, that by proceedings to which he is not a stranger he may well be bound. Under the term "parties" in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense or to control the proceedings, and to appeal from the judgment. This right involves also the right to adduce testimony and to cross-examine witnesses adduced on the other side. Persons not having these rights are strangers to the cause. But to give the full effect to the principle by which parties are held bound by a judgment, all the persons who are represented by the parties and claim under them, or in privity with them, are concluded by the same proceedings.'"

Says the Court in Bennett v. The Star Mining Co. (119 Ill., page 9):

"Persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person fall within the category (of cases *res adjudicata*), and in such cases parol evidence is permissible to show who are the real parties in the case, and that they conducted the litigation in the name of other persons."

In Marsh v. Smith (73 Iowa, 295), the Court lays down the law as follows:

"Counsel for the defendant insists that the transcript of the judgment of the United States Court was erroneously admitted in evidence, and does not support the judgment of the court below for the reason that it is not shown that the defendant was a party thereto. . . . . The abstract shows that the Circuit Court was authorized to find that the defendant had knowledge of the suit and advised and authorized the employment of counsel to defend it for him. Being interested in the suit, and thus aiding in its defense, he was bound by the judgment."

We quote the following from Elliott v. Hayden (104 Mass. 180):

"It is argued for the plaintiff that the defendants were the real parties in interest; directed the attachment, agreed to indemnify the officer, took control of the action against him, and had the property sold by agreement between him and themselves. If these propositions were sustained in fact, the judgment in that action would doubtless be conclusive."

The Supreme Court of Georgia in the case of Linton v. Harris (78 Ga. 265), announces the law in these terms:

"Linton seems to have carried on the suit in Hull's name for his benefit, and the result was that Harris obtained a verdict upon the plea that consideration of the note had failed to the extent of the value of this one lot of land. Then Linton brought an act of ejectment against Harris for the lot of land. . . . . The case as Linton puts it looks rather striking and strong in favor of Mr. Linton, but although he was not a party on the record he really conducted the litigation, and was trying to take the benefit of that litigation, and the judgment would bind him absolutely in any subsequent action on the note. Now, if it would bind him in another action on the note, we think he is bound anywhere and everywhere that he encounters Harris on that same question, even in an action of ejectment."

The case of Daskam v. Ullman (74 Wis. 474) states a proposition in line with the above decision as follows:

"The defendants (not named as parties to the record) knew of the commencement of that action, and that the defense of pay-

ment had been set up in the answer. They consulted with the attorney who brought the suit about this defense; said they would take care of it. They furnished all the witnesses on the trial of that issue, and paid them. They were themselves sworn and made doubtless the best defense they could. Indeed, it appears that they had the entire management and control of the case so far as the issue of payment was concerned. They did not employ other attorneys, doubtless because they were satisfied with those who had charge of the case. But they had a full opportunity to be heard on the question of payment, and did actually defend and meet that issue. Presumably they made all the defense they could upon the issue, but the court found against them. . . . . In this case the evidence shows that the defendants not only had the opportunity to be heard on the defense of payment, but they were actually heard on that issue. They seem to have had the absolute control and management of the case so far as the issue of payment was concerned. We perceive no reason why upon the facts they should not be held concluded by the judgment in the foreclosure action.

"Adams v. Filer (7 Wis. 306), Robbins v. Chicago (4 Wall 657), Carpenter v. Pier (30 Vt. 81) are a few of the many cases which might be cited to sustain the view we have expressed."

The Supreme Court of Indiana deals with the question after this fashion in the case of Palmer v. Hays (112 Ind. 289):

"If it was true, as the appellant proposed to prove, that in the former suit Hays was the real party, and that he personally conducted the suit in the names of the replevin bail under an agreement to pay all expenses and costs, then he was so far in privity with the nominal parties, with whom he was identified in interest, as to be concluded by the judgment. 'The fact that an action is conducted in the names of nominal parties can not divest the case of its real character; the issue was made by the real parties, and the actual interests involved must determine what persons are precluded from again agitating the questions, and who are estopped by the previous decision.' (Freeman on Judgment, Section 174; Mortgomery v. Vickory, 110 Ind. 211; Train v. Gold, 5th Pick. 380.)

"'There are,' said Cowen, J., in Jackson v. Griswold (4th Hill, 522), 'certainly many cases where a party, though not nominally party to the suit, shall yet be concluded by it, because he has in fact taken the management of the cause; nay, where he has had notice of its pendency and a chance to litigate, but neglected to do so.'"

In Coats v. Roberts (4th Rawle, 112) is the following terse statement of the law:

"Whoever has an interest, and has notice, and takes part in a trial, is bound, though not named in the record."

We quote as follows from Van Knoughnet v. Dennie (68 Hun, 179):

"But it appears that the plaintiff in the present action was active and mainly instrumental in prosecuting the action brought by her husband and in establishing the claims therein, which were allowed to him by the Justice of the Peace. At the trial of the present action Mrs. Van K. testified that she attended the trial of the former action; that she conducted her husband to the Justice's office and back again because he was blind; that she heard plainly all that was said in the room; that she gave evidence as a witness; that she knew that her husband was going to bring suit; that she took note of the proceedings, etc. . . . Under these facts, notwithstanding the former assertion by her that she did not know, and was not informed that her claims made in this action were litigated and determined in the other action, the plaintiff is, as seems to us, conclusively estopped by her acts, which procured the judgment in the former cause. Having by her own affirmative acts and testimony procured a judgment of the Court, she can not now be permitted to allege and prove as against the same party any fact inconsistent with the integrity of that judgment. . . . This case therefore rests upon the doctrine that a person who has by his acts procured the rendition of a judgment in a given case can not afterwards be heard to impeach that judgment in any respect for his own benefit."

The statement of law following is taken from Stoddard v. Thompson (31 Ia. 80):

"One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and by doing those things which are usually done by the party, is bound by the judgment rendered therein."

The case of Lyon v. Stanford, 15th Stewart (New Jersey Equity), 411, contains a statement of the proposition under discussion. The opinion reads as follows:

"The charge of the trial judge also shows that the case was presented to the jury, as conclusive of all controversy over the rights of the plaintiff averred in the declaration. I can not doubt that if Ann Lyon had been named as a defendant with her husband, her knowledge of and participation in the suit would have been just what they were, and the conduct of the cause would have differed in no respect from that actually pursued. The defense was in reality her defense, interposed with her consent, by her agent, and substantiated on her behalf, and if it had prevailed,she would have insisted,and with justice, that it estopped the plaintiff from any further denial of her right to maintain the building which her husband had erected for her. Under these circumstances, the mere absence of her name from the record will not absolve from the binding force of the judgment. The judgment becomes conclusive not only on the apparent parties, but also on those who are the real litigants."

Cumulative on the same point are Conger v. Chilcote, 42 Iowa, 18; Estelle v. Peacock, 48 Mich. 469; Gill v. U. S., 7 Ct. of Cl. 522; Follansbee v. Walker, 74 Pa. St. 306; Bennett v. Wilmington S. M. Co., 18 Ill. App. 17; Tate's Ex'rs. v. Hunter, 3 Strob. Eq. 136; Wood v. Ensel, 63 Mo. 193; Ven Plank v. Van Buren, 76 N. Y. 247; Montgomery v. Vickery, 110 Ind. 211; Cole v. Favorite, 69 Ill. 457.

The decision of the Kentucky Court of Appeals is in substance and effect, that the Louisville & Nashville Railroad was the real party defendant in the suit of Schmidt v. Louisville, Cincinnati & Lexington Railway Co., and as such was bound to perform the judgment rendered in that action; because the L. & N. had avowedly and alone conducted the entire defense in the cause in the protection of an interest which it had in the litigation, and the issue between it and the C. & O. bondholders had already been determined by the same means, in the same manner, and to the same extent as if the L. & N. had been named of record.

Under the authorities cited, we submit that the settled maxims of the law both sanctioned and required such a ruling. Had the action of Schmidt v. L., C. & L. resulted in a judgment for the defendant therein, and the bondholders had then sued the L. &

N., there can be but little doubt what the defense to the second action would have been, *res adjudicata*, with emphasis.

Applying now Mr. Webster's rule, we shall content ourselves with the statement that for more than fourteen years the plaintiff in error has been heard in every possible defense that legal capacity could devise to meet the exigencies of this action. Further, that the proceedings have been upon the most careful and extensive inquiry, an inquiry which necessarily involved the merits of the L. & N.'s contention that it was entitled to the possession of the property sought to be recovered in the action. Further, that the judgment was entered after the fullest and fairest trial of the issue as the L. & N. saw fit to raise it. The record speaks so eloquently on this subject that we refrain from argument.

These features of the case being made to appear, surely there is nothing arbitrary, oppressive, or unjust about the proceedings, save and except the part which plaintiff in error has played. It has kept this case in court until the worry and turmoil of contest have grayed the hair of lawyer and litigant, and costs representing a fortune have emptied the pockets of the humbler party.

We do not intend to make specific application of the various authorities cited to the case at bar. This Court can and will draw its own conclusion.

Reviewing the citations in a general way, we would suggest that we have yet to discover a text-writer or court who makes the naming of a party in the record a necessary element of "due process of law." Such a requirement would reduce law to an absurdity, and render the forum a stage for farce. To contend that the mere absence of a party's name from the record stays completely the hands of the Court in the administration of justice is to throw away the oyster and offer to litigants the consolation of a shell. Such a doctrine does nothing short of sanctioning fraud. Such a policy puts a premium on purely champertous litigation. Nothing would so encourage and foster legal strife as to permit one to fight another's battles, incidentally

fighting his own, and be immune from all consequences of conflict.

It will not do for a party to employ the process of a Court for fourteen years in the attempted vindication of a right or a position, and at the end of that time, when judgment is found against it, to tell the Court that it has only been in the struggle for excitement, and has only litigated in a spirit of fun.

With the facts of the case, as we have before stated them, undisputed by even a suspicion of contradiction or denial, we submit the following conclusions:

The L. & N. had every motive and inducement for appearing in the litigation and conducting a defense.

The case involved the vital issue of whether $90,000.00 of earnings held by the L. & N. belonged to the C. & O. bondholders.

The litigation offered opportunity for the L. & N. to have determined every question concerning its right to hold the $90,000.00 sued for, and its liability to answer the bondholders in that amount.

The L. & N. knew that the nominal defendant, the L., C. & L., could not and would not defend the action. The L., C. & L. was really no longer in existence, its mere license to exist being but a fiction of law. The L., C. & L. had no means for conducting a defense; it had no motive to do so. To it, success and failure signified nothing.

With this incentive to action, the L. & N. took up the fight and carried it on for fourteen years, litigating every possible phase of its indebtedness to the bondholders of the C. & O.

The L. & N. was the real defendant to the action, and rightly held concluded by the judgment.

We consider it unnecessary to elaborate the various conclusions stated above. To us they appear as manifest as the facts and premises upon which they are based.

Say that the allegations made by the affidavit, the basis of the rule, had been controverted by the L. & N., and on the issue

thus joined proof had been taken and judgment rendered in favor of the bondholders, would there then be any doubt or question of the L. & N. having had its day in Court? Is the case less strong because the statements of the affidavit did not admit of a successful traverse and come to this Court unchallenged and admitted?

We do not believe that this Court will require the defendants in error to again jeopardize their interest by submitting for a second trial an issue that has already been heard and determined. There has been no hardship worked upon the plaintiff in error in this case. Having admitted by its response that it had collected the money for which judgment was entered against it, and that such collection had been had under circumstances which offered no possible cause for retaining the money, manifest right and justice decree that restitution should be made.

Res Adjudicata on Rule and Response.

Not only was the L. & N. a party defendant to the suit against the L., C. & L., but by its response to the rule issued for the purpose of establishing that fact, it made such defense as to render the entire litigation *res adjudicata* against it. The L. & N. in its response, in addition to allegations by which it attempted to inject a Federal question into the case, raised an issue going to the very merits of the controversy. Having been heard and defeated on that issue, it can not now say that a day in court has been denied it.

We quote from the response of the L. & N., pages 294, 295 of the Record: "Respondent says that this suit was instituted against the Louisville, Cincinnati & Lexington Railway Company upon a contract duly signed and delivered by it. . . . . The lease of the road and franchises of the Northern Division of the Cumberland & Ohio expressly provided that no assignment thereto should be made except upon the written consent of the lessor; and although the respondent requested of said Cum-

berland & Ohio Northern division to assent to said assignment, this respondent, notwithstanding said refusal, entered upon and continued to operate said road." (Rec. p. 295.)

By these allegations the L. & N. denied its liability on the contracts existing between the bondholders of the C. & O. and the L., C. & L., and thus sought to avoid the responsibility of the judgment rendered against the L., C. & L. Upon this issue, proof was introduced in the shape of affidavits, setting forth the proceedings in the Shelby Circuit Court in which, under the decision of the Kentucky Court of Appeals, the L. & N. was held bound by the provisions of the contracts above referred to. On this proof the Court held the response on the merits insufficient and entered judgment, of which the plaintiff in error now complains. (Rec. p. 296, 297.)

It will therefore be seen that the L. & N. not only litigated the case in the name of the L., C. & L., but in its own name presented an issue on the rule which involved a consideration of its liability upon the whole claim presented. On both phases of the action, judgment has been rendered against it, and yet it complains of a want of due legal process.

Has This Court Jurisdiction?

We come now to a most important question reserved for the conclusion of this argument, because what has been heretofore said prepares the Court better to comprehend it. Will the Supreme Court review the decision of the Kentucky Court of Appeals? We contend that the writ of error did not properly lie in this case, and that this Court has no jurisdiction to sanction or disapprove the adjudication of the State Court.

Certainly every case decided by judge or jury involves the question of process of law. Law and process of law are in a measure convertible terms. So all litigation involves in one sense of the phrase "due process of law," for whether a case is determined rightly or erroneously necessitates a consideration of

whether the legal processes employed in reaching a judgment have been due and proper. Webster defines "due" as "proper." But this does not mean that every case decided by the State Courts can be brought to the Supreme Court for review. As a matter of fact, it is seldom, indeed, that this Court has allowed a writ of error based on the statutory edict providing "due process of law." The very allowance of the writ implies the exercise of arbitrary power on the part of the State Judiciary, a power repugnant alike to fairness and law.

"No man shall be deprived of property without due process of law," is the title of a composite picture of every scene in Anglo-Saxon history It but re-echoes the cry first heard at Runnymede, "No divine rights," "no tyranny," "no confiscation." It was intended as a pledge to the world that on this side the Atlantic there should be no such mockeries of justice as had disgraced the forums of the Old World.

But "due process of law" does not denounce every erroneous decision of the Courts as unconstitutional. It does not guarantee that on every proposition affecting property the judgment of the State Court should be subject to review and reversal by the Supreme Court of the United States. It was not intended that because a record contains an adjudication relative to parties to actions that it can properly be brought to the consideration of this tribunal.

Says Mr. Justice Waite in Arrowsmith v. Harmoning (118 U. S. 194):

"The constitutional provision is, 'Nor shall any State deprive any person of life, liberty, or property without due process of law.' Certainly the State can not be deemed guilty of a violation of this constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. The legislature of a State performs its whole duty in this particular when it provides a law for the government of its courts while exercising their respective jurisdictions, which, if followed, will furnish the parties the necessary constitutional protection. All after that pertains to the Courts, and the parties are left to the proper remedies for correction of errors in judicial proceedings."

Upon this subject it was said, in the case of Allen v. Georgia, 166 U. S. 138, 140, as follows:

"To justify any interference upon our part it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State had acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. *We might ourselves have pursued a different course in this case, but that is not the test.* The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

This statement is quoted with approval in Hovey v. Elliott, 167 U. S. 409, 443, and Wilson v. North Carolina, 169 U. S. 593.

Thus prefaced, we venture the assertion that the judgment of the Kentucky Court of Appeals in the case of the L. & N. Railroad v. Schmidt was based on such broad and general propositions of law as to forbid this Court denying the State Court the right to decide as its reason and policy seemed best. The Kentucky Court of Appeals held that the judgment against the L. & N. was based on the dual findings—(1) that this was a proceeding *in rem*, and (2) that the L. & N. being the real party defendant to the suit, was concluded by the judgment. Surely there is foundation for both rulings. On the question of this being a proceeding *in rem*, read the Record. The relief sought was the enforcement of a lien upon certain property, viz: the earnings of the L. C. & L. from or over the C. & O. The existence of such lien and the right to have it enforced constitutes the issue of the entire litigation. The State Court held that the action was a proceeding *in rem* or an action in the nature of a proceeding *in rem*, and that the L. & N., having the fullest notice, was bound by the judgment affecting the *res* in

controversy. That there is authority for such decision is developed by citations already made in a preceding portion of this brief.

But, considering the decision right or wrong, will the Supreme Court review this solemn announcement of general law and say what shall be or what shall not be proceedings *in rem* in Kentucky?

We answer this in the language of Mr. Justice Brown in the case of Woods v. Brady (150 U. S. 18):

"The question of whether an action to foreclose a lien of this kind is *in rem* or *in personam* under the practice in California is one upon which the decision of the Supreme Court is binding, and its ruling that the plaintiff, being no party to its suit to foreclose, had a right to show by evidence *aliunde* the invalidity of the judgments obtained by them, is not a proper subject for review by this Court.

"In no aspect does the case present a Federal question, and the writ is dismissed."

Again, the Kentucky Court of Appeals held the L. & N. bound by virtue of the general proposition of law which we have heretofore announced and supported, viz., that a party who directs the defense of an action can not deny his liability to perform the judgment entered in the cause. *Such a decision by the State Court is but an application of the equitable principle of estoppel.*

The proposition regarding conclusiveness of judgments as to persons not named in a record is a department of the doctrine of estoppel. Black treats and discusses the subject under the head of "Estoppel by Judgment" (2 Black on Judgment, Section 540). Herman considers the question under the title of "Estoppel in its Application to Personal Judgments, or Judgments between Parties" (Herman on Estoppel, Section 129). Freeman works out the doctrine through the medium of estoppel (Freeman on Judgments, Section 174). So through the entire list of text-books and case law, the principle, wherever

applied, has been based upon this theory. The Court will perceive from the very nature of the proposition that it is founded on estoppel. A person will not be heard to deny his liability on account of an action when he has been in the Court defending the litigation, is a perfect example of the equitable principle of estoppel. The Court of Appeals of Kentucky, therefore, in the announcement of the law by which it held the L. & N. bound by the judgment rendered in the case of Schmidt v. the L. C. & L., but applied to the facts of the case a general and well established principle of equity jurisprudence.

The law announced by the State Court in this action is also based upon a principle of State policy. To permit a person to conduct an extensive and expensive litigation merely for amusement, as the L. & N. would have the Court believe it proceeded in this case, means to harass and hamper Courts, and seriously impede the administration of justice. To discountenance such practice, a State, in the settlement of its judicial policy, establishes a rule by which the party litigating is held bound by the result of the litigation.

If either of these contentions be correct, and this decision of the Kentucky Appellate Court rests on principles either of estoppel or policy, then this Court is without jurisdiction to review that decision. This Court has repeatedly announced such to be the law.

The decision of Israel v. Arthur (152 U. S. 361) seems to us decisive upon this question. We quote from the opinion of Mr. Chief Justice Fuller:

"The Supreme Court of Colorado ruled in Arthur v. Israel (15 Col. 147) 'that public policy required that when the wife without cause deserts her husband and home, and for years lives in adultery with another man, and afterwards, upon learning that a divorce has been obtained by her deserted husband, causes a marriage ceremony with her paramour to be solemnized, and continually lives and cohabits with him as his wife, she may not, upon the subsequent decease of her abandoned husband, take advantage of the fact that the divorce decree is void for want of

proper service of process, and successfully assert against other heirs her right under the statute of descents and distribution to deceased's estate as his widow.' And on the subsequent writ of error it sustained the judgment of the county court against plaintiff in error upon the facts.

"With the conclusion on the facts we have nothing to do, and the conclusions of law were conclusions in matters of local and general law which suggest no Federal question.

"By stipulation of record plaintiff in error admitted at the trial that the invalidity of the divorce decrees being conceded, the only question to be tried was whether she was 'estopped by her conduct as alleged in said answer to dispute or contest the validity of said decrees, or whether she has ratified them by her conduct.'

"That question was determined against her, and the judgment rested solely on the ground that she could not under the facts be allowed, as to John Arthur's personal estate, to assert the property rights conferred by law upon a widow. To review that judgment would be to overhaul the application by a State court of principles of public policy and of estoppel, which is not within our province to do. This was so held in Morrow v. Brinkley, 129 U. S. 178, and in effect in many other cases. Adams County v. Burlington & Missouri Railroad, 112 U. S. 123; Chouteau v. Gibson, 111 U. S. 200; Beaupre v. Noyes, 138 U. S. 397.

"In Eustis v. Bolles, 150 U. S. 361, it was ruled that a decision by the Supreme Judicial Court of Massachusetts that a creditor of an insolvent debtor who proved his debt in insolvency proceedings under the State statutes and accepted the benefits thereof, thereby waived any right he might otherwise have had to object to the validity of the insolvency statutes as impairing the obligation of contracts, presented no Federal question for review. And it has been often held, at least in actions at law, that this court has no jurisdiction to revise the decision of the highest court of a State upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way. Dower v. Richards, 151 U. S. 658, and cases cited."

This Court, in Gillis v. Stinchfield (159 U. S. 658), said:

"But the decision of the Supreme Court was clearly based upon the principle of estoppel deemed by the court to operate against the plaintiff in error upon general principles of law and the statute of California in respect of such a conveyence as that to Stinchfield, and irrespective of any Federal question. The writ of error must therefore be dismissed."

To the same effect is the decision in the case of the Electric Company v. Dow, 166 U. S. 490.

Morrow v. Brinkley, 129 U. S. 178, contains a statement of the law in the following language:

"Conceding that Wests's title to the particular land had been divested by sale under the confiscation proceedings, and that the interest of the heirs remained unaffected thereby, yet if they were concluded under the circumstances by the deed of May, 1872, or upon the principles of estoppel and laches, that disposed of their case adversely; and it was upon these grounds that the Virginia Courts proceeded, and not upon any decision against any right, title, privilege, and immunity claimed under the Constitution or any statute of the United States.

"Unless it appears affirmatively that the decision of a Federal question was necessary to the determination of the cause and that it was actually decided, or that the judgment as rendered could not have been given without deciding it, this Court has no jurisdiction of a writ of error to a State Court."

The statement of the law as contained in Sayward v. Denny (158 U. S. 180) seems equally controlling on this motion. The Court says:

"The contention is that the results of the rulings and decisions of the trial court as affirmed by the Supreme Court was to hold plaintiff in error conclusively bound by the judgment rendered against Crawford in an action 'in which he was not a party, and of which he had no notice'—and that this was to deprive him of property without due process of law. . . . .

"We are not called on to review these views of the principles of general law considered as applicable to the case in hand. The State Courts were never led to believe that a protection under the Constitution was invoked. . . . And we might add that the decisions of State tribunals in respect of matters of general law can not be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error."

We close this feature of the case with these citations, not that they exhaust the authorities on the question, but because they serve to indicate how well established is the rule and principle for which we contend.

The discussion establishing the contention that the Federal question was not raised in time will be presented by associate counsel.

With this, we close the case for defendant in error. The statement of the facts has been made somewhat elaborate, and the citations in numbers, with the hope that some labor might thereby be saved the Court.

Defendant in error asks that his motion to dismiss or affirm be sustained, and to this end the foregoing argument is most

Respectfully submitted,

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APPENDIX.

POINTS MADE AND AUTHORITIES CITED.

On Motion to Dismiss.

The State Court held that the question of whether the plaintiff in error had been the real party defendant to the suit of Schmidt, Trustee, v. Louisville, Cincinnati & Lexington Railway Co. could be and was determined by proceeding by rule and response. The form sanctioned gave notice to the plaintiff in error, and afforded it fair opportunity to be heard. The fact that the investigation was on motion instead of a new action instituted in no way rendered the proceeding not "due process of law."

Iowa Central Railway Co. v. Iowa, 160 U. S. 392.

The State Court held that this was a proceeding *in rem*, and that the plaintiff in error, having had the fullest notice of the action, was bound by the judgment affecting the *res*. This decision of the State Court presents no Federal question.

Woods v. Brady, 150 U. S. 18.

The State Court held the plaintiff in error bound by virtue of the general proposition of law, that a party who directs the defense of an action in the protection of an interest which he has in the litigation can not deny his liability to perform the judgment entered in the cause. This decision of the State Court, being based upon the principles of estoppel and policy, is not reviewable by the Supreme Court.

Israel v. Arthur, 152 U. S. 361.
Gillis v. Stinchfield, 159 U. S. 658.
Electric Company v. Dow, 166 U. S. 490.
Morrow v. Brinkley, 129 U. S. 178.
Saywood v. Denney, 158 U. S. 180.
Eustis v. Bolles, 150 U. S. 361.

The fact that the Supreme Court might have pursued a different course in the case is not the test of "due process of law."

Arrowsmith v. Harmoning, 118 U. S. 194.
Allen v. Georgia, 166 U. S. 138.
Hovey v. Elliott, 167 U. S. 409, 443.
Wilson v. North Carolina, 169 U. S. 593.

ON MOTION TO AFFIRM.

This was a proceeding *in rem*, and the plaintiff in error with notice of the proceeding was bound by the judgment affecting the *res*. The fact that no actual seizure of property was had does not deprive the action of its identity as a proceeding *in rem*.

Work on Courts and their Jurisdiction, Section 14.
Pennoyer v. Neff, 95 U. S. 714.
Scott v. McNeal, 154 U. S. 34.

The plaintiff in error having in every aspect of the case defended the action in the protection of an interest which it had in the litigation, is bound by the judgment, notwithstanding the fact that it was not named of record.

Freeman on Judgments, Sections 174, 175.
Black on Judgments, Sections 539, 540.
Herman on Estoppel, Sections 156, 182.
Van Fleet on Former Adjudication, Section 523.
Jones on Evidence, Section 602.
The A. & E. Encyclopedia of Law, Vol. 12, page 97; Vol. 21, page 177.
Eagle Mfg Co. v. Bradley Mfg Co., 50 Fed. Rep. 193.
Lovejoy v. Murray, 3 Wall. 18.
Bennett v. The Star Mining Co., 119 Ill. 9.
Marsh v. Smith, 73 Ia. 295.
Elliott v. Hayden, 104 Mass. 180.
Linton v. Harris, 78 Georgia, 265.

Daskam v. Ullman, 74 Wis. 474.
Palmer v. Hays, 112 Ind. 289.
Coats v. Roberts, 4 Rawle, 112.
Van Knoughnet v. Dennie, 68 Hun, 179.
Stoddard v. Thompson, 31 Ia. 80.
Lyon v. Stanford, 15 Stewart, 411.

A party to an action is one who is directly interested in the subject-matter, who has a right to make defense, examine, and cross-examine witnesses, and appeal from the judgment.

Robbins v. Chicago, 4th Wall. 657.
Beloit v. Morgan, 7 Wall. 619.
Miller v. Liggett, etc. Co. 7 Fed. Rep. 91.
American Bell Tel. Co. v. Nat. Imp. Tel. Co., 27 Fed. Rep. 666.
Morse v. Knapp, 37 Fed. Rep. 352.
Wilson's Ex'r v. Deen, 121 U. S. 525.

The unanimity with which these propositions have been sanctioned indicates conclusively that the contentions of plaintiff in error are asserted but for delay.

Respectfully submitted.

JOHN G. SIMRALL,
For Defendant in Error.